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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 592

A. A. SPRAGUE, Receiver for the Chicago, North Shore and Milwaukee Railroad Company, *Petitioner*,

v.

J. ALBERT WOLL, United States Attorney for the Northern District of Illinois, et al., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

RALPH R. BRADLEY,
FREDERICK E. STOUT,
ROBERT E. QUIRK,
Attorneys for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Now comes A. A. Sprague, receiver for the Chicago, North Shore and Milwaukee Railroad Company, and respectfully petitions this court to grant a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to remove therefrom, for review here, the record in No. 7608, wherein petitioner is appellant, and J. Albert Woll, United States Attorney for the Northern District of Illinois, and certain interveners, are appellees, and in which that court announced its opinion, not yet reported

on July 22, 1941 (R. 574), in which it affirmed the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division (R. 551), and states:

1. On August 16, 1939, petitioner filed a petition in the United States District Court for the Northern District of Illinois, Eastern Division, in which it sought an injunction against the United States Attorney for that district to restrain him from prosecuting any suit or other action against petitioner for violations of the Railway Labor Act (R. 2-42). During the pendency of the injunction proceedings in that court there were a number of interventions by parties claiming to be interested therein: the Interstate Commerce Commission by petition intervened and became a party; Division 900 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, a labor organization with which petitioner has, for many years, had labor contracts, intervened and became a party; the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen intervened by filing their appearances by counsel. Answers were filed by the defendants (R. 42-46; 63-70; 73-75).

The case involves decisions of the Interstate Commerce Commission. One of these proceedings involved the question whether the petitioner is subject to the Railway Labor Act. The other proceeding involved the reopening of the Railway Labor Act case and its consolidation with proceedings arising under the Railroad Retirement Act of 1937 and its companion act, the Carrier's Taxing Act of 1937. The hearing in the District Court was on the petition and answers, and the record of the two proceedings before the Commission.

2. The Railway Labor Act, after defining the term "carrier" contains the following provision:

> "* * * *Provided, however,* That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a

part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

The exempting language of the Railroad Retirement Act of 1937 and of the Carriers' Taxing Act of 1937, is identical with the exempting language of the Railway Labor Act, already quoted. (45 U. S. C. A. Secs. 228a and 261).

In January, 1933, this court held that petitioner was an interurban electric railway, as that phrase is used in Section 20a of the Interstate Commerce Act. (49 U. S. C. A. Sec. 20a) *United States* v. *Chicago North Shore and Milwaukee R. Co.*, 288 U. S. 1.

3. On November 7, 1936, in Railway Labor Act Docket No. 7 (219 I. C. C. 135), the Interstate Commerce Commission, upon the request of the National Mediation Board, after hearing, determined that the petitioner is an interurban electric railway which falls within the exemption proviso of the Railway Labor Act (R. 20-27). In that proceeding Division 900 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, representing the employees of the petitioner, intervened and urged that the Commission determine the petitioner to be an interurban electric railway. (R. 133-136; 165-167). In October, 1937, the same employee organization filed a complaint with the Commission requesting it to decide that petitioner is subject to the Railroad Retirement Act of 1937. Later, the Commissioner of Internal Revenue requested the Commission to make a determination of the status of the petitioner under the Carriers' Taxing Act of 1937. As the result of the complaint of the employees and of the request of the Commissioner of Internal Revenue, the Commission

instituted a proceeding known as Electric Railway Docket No. 2.

4. On February 25, 1938, the Commission by order purported to reopen Railway Labor Act Docket No. 7, on its own motion, for further hearing in connection with Electric Railway Docket No. 2 (R. 195-196). The Commission did not, by that order or by any subsequent order, affirmatively vacate or set aside its determination of November 7, 1936, made in Railway Labor Act Docket No. 7. Over the objection of petitioner the two dockets were later consolidated and heard together on a common record (R. 203-204). As a result of the consolidated hearing the Commission, on July 11, 1939, determined (234 I. C. C. 13) that petitioner did not fall within the terms of the exemption proviso of the Railway Labor Act, the Railroad Retirement Act of 1937, or the Carriers' Taxing Act of 1937 (R. 522-536).

5. The errors relied on by petitioner arise out of the action of the Interstate Commerce Commission in purporting to rehear and reconsider its determination of November 7, 1936, in the Railway Labor Act case, out of its determination of July 11, 1939, in which it held that the petitioner does not fall within the exempting language of the Railway Labor Act, and out of the action of the court below in affirming the judgment of the District Court which sustained the Commission and refused, permanently to enjoin the defendant, the United States Attorney.

6. Since September 30, 1932, the properties of the Chicago, North Shore and Milwaukee Railroad Company, hereinafter sometimes called the "North Shore," have been operated by petitioner under receivership proceedings (R. 130 and 350). These properties have developed through various transfers and reorganizations, out of a street railway company, organized more than thirty years ago (R. 124-125; 344-345). The North Shore is operated by electric power. It operates a passenger service between Roosevelt Road, in Chicago, Ill., and 6th and Michigan Streets, Mil-

waukee, Wis., a distance of 85 miles (R. 101, 241, 353 and 354). Approximately 77 per cent of the total revenue from transportation services of the North Shore is derived from the carriage of passengers; the remainder of such revenue is derived from the carriage of freight of various kinds (R. 19, 118, 337, 479-493). About 14 per cent of the total revenue from transportation services is derived from carload freight (R. 479-493).

7. The North Shore operates in and out of Chicago over the elevated tracks of the Chicago Rapid Transit Company as far south as Roosevelt Road and as far north as the northern boundary of Evanston, Illinois, a suburb to the north of Chicago. These tracks are used by the trains of the North Shore in common with the trains of the Chicago Rapid Transit Company. The latter company performs the local passenger elevated transportation service in Chicago (R. 355-356). From Howard Street, which is the boundary between Chicago and Evanston the operations of the North Shore are over two routes; one is called the Shore Line, which continues north through Evanston, Wilmette, and other intermediate suburbs and municipalities, to North Chicago Junction, and the other is called the Skokie Valley Line which extends westerly to Niles Center and thence north through Skokie Valley to North Chicago Junction, where the two lines join and proceed north to Milwaukee. (R. 101, 241, 354-356). A branch line extends from Lake Bluff, Illinois, westerly through Libertyville to Mundelein, Ill. (R. 101, 241, 354). From North Chicago Junction there is a branch line extending northeasterly through North Chicago to the business center of Waukegan, Illinois, the main-line continuing north from North Chicago Junction through the westerly portion of North Chicago and Waukegan, thence through Zion, Winthrop Harbor, Kenosha, Racine to Harrison Street, Milwaukee, Wisconsin. From Harrison street, Milwaukee, to the terminal in down-town Milwaukee, the operation is over the tracks of the Chicago and Milwaukee Electric Railway Company, a local street car

company in Milwaukee, the stock of which is owned by the North Shore. Local street car and bus services are also performed by the North Shore in Waukegan, Illinois.

8. In Milwaukee no carload freight may be handled over the tracks of the Chicago and Milwaukee Electric Railway Company (R. 119, 120-121, 211, 375), which company is used as a passenger terminal entrance by the North Shore from Harrison Street to the down-town passenger station at 6th and Michigan Streets, Milwaukee. (R. 103, 242, 356). On the Shore Line carload freight cannot be handled south of Highland Park, Ill. (R. 123, 211), but on the Skokie Valley line carload freight can be handled by the use of gauntlet tracks between Buena Park, within the corporate limits of Chicago, and Harrison Street, Milwaukee. (R. 211, 262). In Chicago no carload freight and no standard steam railroad freight equipment can be handled by the North Shore south of Buena Park, at which point there is an interchange connection with the Chicago, Milwaukee, St. Paul & Pacific Railway Company (R. 375). This connection exists by reason of the fact that the North Shore and the Chicago Rapid Transit Company jointly operate over the former Evanston Division of the Chicago, Milwaukee, St. Paul & Pacific Railroad, under leases and contracts approved by the Illinois Commerce Commission (R. 377-379). All carload business of the North Shore which is handled between Buena Park and Howard Street over the Evanston Division, is by sufferance of the Milwaukee railroad and not as a matter of right. (R. 378-379). Moreover, the interchange of carload freight with the Milwaukee railroad at Buena Park is, as explained by Witness Fallon, executive officer for the petitioner, under special conditions and is circumscribed and limited. (R. 377-381).

The North Shore has a freight terminal at Harrison Street, within the city limits of Milwaukee, at which carload and less-carload freight may be handled (R. 262); but the North Shore does not have any interchange track connection with any steam railroad at Harrison Street or at

any other point within the City of Milwaukee. (R. 376, 381.).

Approximately 19 per cent of the total route miles of the North Shore cannot be used for the transportation of freight in standard steam railroad freight equipment. (R. 375-376). The North Shore interchanges freight and participates in joint through freight rates with steam railroads. (R. 118).

9. Under the President's Proclamation of December 28, 1917, all railroads engaged in general transportation, whether operated by steam or electric power, except street, suburban and interurban electric railways, were taken over by the Government. The North Shore was not taken under Federal Control under that Proclamation, or otherwise.

10. All of the outstanding securities of the North Shore were issued under the authority and approval of the regulatory commissions of Illinois and Wisconsin, with the exception of one series of its first and refunding mortgage bonds, which were approved by the Interstate Commerce Commission during the pendency of the appeal of the suit which resulted in the decision of this court in *U. S.* v. *C. N. S. & M. R. Co.*, 288 U. S. 1, in which case this court sustained the decree of the District Court of the Northern District of Illinois, Eastern Division, which held that the North Shore was an interurban electric railway as that term is used in Section 20a of the Interstate Commerce Act. The effect of that decision was to deny jurisdiction of the Interstate Commerce Commission over the issuance of securities by the North Shore. The fact that the securities of the North Shore have been issued with the approval of the administrative commissions of Wisconsin and Illinois, has regularly and continuously been made known to the Interstate Commerce Commission in the annual reports of the North Shore to that Commission (R. 126 and 347). Since January, 1933, the Illinois Commerce Commission is the only regulatory body which has exercised authority to approve the issuance of petitioner's certificates and other securities issued by the petitioner, the regulatory commission of Wis-

consin having disclaimed jurisdiction since that time. (R. 130).

None of the securities of the North Shore are owned by any steam railroad (R. 130, 350-351). The North Shore is not operated as a part of any steam railroad system of transportation. It is an independently owned and independently operated electric railway, which performs an interurban, suburban and street car service (R. 130 and 350).

11. Since the decision of this court in the North Shore Securities case, in January, 1933, there has been no material change in the physical or functional characteristics of the North Shore (R. 131 and 382; also Ex. No. 1 at 141-163). The operation of the North Shore over the elevated structure in Chicago, between Roosevelt Road and 63rd Street, on the south side of Chicago, as well as the operation of some of the street car service in Waukegan, has been abandoned since 1933 (R. 101, 248 and 354). The number and location of interchange points with steam railroads has not been increased (R. 131, 147). The percentage of passenger and freight revenues to total revenues has been practically constant each year since 1930 (R. 19, 339, 479-493). (Ex. Nos. 51-A-58-A), although there has been a substantial decrease in the revenue from freight traffic since 1930 (R. 340). This is vividly illustrated by the appendix attached hereto, which is based on exhibits shown at Pages 479 to 493 of the printed record.

The reasons relied on for the writ are:

FIRST—The decision of the court below is contrary to the decision of this court in *U. S.* v. *Chicago, North Shore and Milwaukee R. Co.*, 288 U. S. 1; *Piedmont and Northern Ry. Co.*, v. *Interstate Commerce Commission*, 286 U. S. 299; *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 127; and is not in harmony with the decision of the Circuit Court of Appeals, Second Circuit, in *Hudson & Manhattan* v. *Hardie*, 103 F. (2nd) 327; Certiorari denied 307 U. S. 640.

SECOND—When the Interstate Commerce Commission, on November 7, 1936, determined, at the request of the Na-

tional Meditation Board, as provided in the Railway Labor Act, that the North Shore fell within the exemption provisions of that act, the authority of the Commission was exhausted, and the Commission had no right or authority thereafter, on its own motion, to reopen the case and to consolidate it for further hearing with other cases, as no administrative authority is conferred on the Commission by the Railway Labor Act. Nor does that Act confer any authority upon the Commission to determine, upon its own motion, whether a particular electric railway falls within the exemption proviso thereof. The determination by the Commission was not an order. *Shannahan, et al.*, v. *United States*, 303 U. S. 596. Unlike the Interstate Commerce Act, which confers authority upon the Commission to institute investigations on its own motion, as to any matter or thing concerning which a *complaint* is authorized to be made, the Railway Labor Act contains no such provision (49 U. S. C. A. Sec. 13(2). Even under the Interstate Commerce Act, where the Commission is authorized to suspend or modify its own orders upon such notice and in such manner as it shall deem proper, its authority is limited to an order still under its control. *Louisville & Nashville R. R. Co.* v. *Sloss-Sheffield Steel and Iron Co.*, 269 U. S. 217, at 225.

THIRD—On February 25, 1938, the Commission, by order, purported to reopen Railway Labor Act Docket No. 7, on its own motion, without application or complaint from anyone, for further hearing in connection with Electric Railway Docket No. 2 (R. 195-196). The Commission did not by that order or by any subsequent order, affirmatively vacate or set aside its determination of November 7, 1936. The order of February 25, 1938, is null and void, and the action of the Commission thereunder in consolidating Railway Labor Act Docket No. 7 with the other docket for hearing, is unlawful, arbitrary and capricious.

FOURTH—The determination of the Interstate Commerce Commission of July 11, 1939, as the result of the consolidated hearing, that the North Shore is subject to the

Railway Labor Act, is contrary to its first determination, contrary to the decision of this court, is arbitrary, capricious, contrary to applicable rules of law, and contrary to the evidence.

FIFTH—The determination of the Interstate Commerce Commission of July 11, 1939, is void because facts and circumstances were considered by the Commission which could not legally influence its action. *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *Florida East Coast R. Co.* v. *United States*, 234 U. S. 167, at 188. The report of the Commission of July 11, 1939, contains a finding to the effect that the position of the labor organization, complainant in the Railroad Retirement Act case, was different from the position taken by the same labor organization in the *Railway Labor Act* case (R. 526, 234 I. C. C. 13). The report also contains a finding that the steam railroad Brotherhood labor organizations had intervened since the first hearing and had contended that the North Shore did not fall within the exemption proviso of the Railway Labor Act (R. 526). The Commission was improperly influenced by the beneficial results to be obtained for the employees under the Railroad Retirement Act (R. 536). The Commission had no right to permit itself to be influenced to any extent by the identity or the importance of the parties concerned, nor by the desire of one party over that of another, nor by any results, which, in the opinion of the Commission, might be beneficial or otherwise.

SIXTH—The determination of the Commission in its report of July 11, 1939, that the North Shore is not a street, interurban or suburban electric railway within the exemption proviso of the Railway Labor Act and that it is operated as a part of the general steam railroad system of transportation, is contrary to the statute and is arbitrary and capricious.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of

this Honorable Court, directed to the United States Court of Appeals, Seventh Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, 7608, A. A. Sprague, Receiver for the Chicago, North Shore and Milwaukee Railroad Company, petitioner-appellant, v. J. Albert Woll, United States Attorney for the Northern District of Illinois, respondent-appellee, and that the said judgment of the United States Court of Appeals, Seventh Circuit, may be reversed by this Honorable Court, and that your petitioner have such other relief in the premises as this Honorable Court may seem meet and just; and your petitioner shall ever pray.

A. A. SPRAUGE,
Receiver for Chicago, North Shore and Milwaukee Railroad Company,

RALPH R. BRADLEY,
FREDERICK E. STOUT,
ROBERT E. QUIRK,
Attorneys for Petitioner.

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v.

J. ALBERT WOLL, United States Attorney for the Northern District of Illinois, et al., *Respondents*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Court of Appeals, Seventh Circuit, made on July 22, 1941, not yet reported, is printed in the record at page 574.

The memorandum opinion of the District Court of the United States for the Northern District of Illinois, Eastern Division, filed November 18, 1940, not reported, is printed in the record at Pages 544 to 549, inclusive. The order of that court, entered November 18, 1940, is shown at Pages 542 and 543 of the printed record.

JURISDICTION.

The jurisdiction of this court is invoked under the provisions of Section 204a of the Judicial Code, as amended by the act of February 13, 1925 (C. 229, Sec. 1-43, Stat.: 938, 28 U. S. C. A. Sec. 347 (a)).

The date of the judgment to be reviewed is July 22, 1941, (R. 580).

STATEMENT OF THE CASE.

The foregoing petition for a writ of certiorari contains a concise statement of the case and, in the interest of brevity and to avoid repetition, it is hereby adopted.

SPECIFICATION OF ERRORS.

1. The United States Circuit Court of Appeals, Seventh Circuit, erred in sustaining the order and judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division.

2. That court erred in holding that the Interstate Commerce Commission had the authority, on its own motion, to reopen and reconsider its determination of November 7, 1936, as no such authority is conferred upon that Commission by the provisions of the Railway Labor Act or by the provisions of the Interstate Commerce Act.

3. That court erred in failing to find that when, on November 7, 1936, upon the request of the National Mediation Board, the Commission determined that the petitioner fell within the exemption proviso of the Railway Labor Act the Commission exhausted its authority over the subject-matter under the provisions of that Act, and that it had no authority thereafter, on its own motion, to reopen that proceeding for further hearing and for a reconsideration of the question.

4. That court erred in holding that the determination made by the Interstate Commerce Commission, of July 11,

1939, as the result of the further hearing on the consolidated record, that petitioner does not fall within the terms of the exemption proviso of the Railway Labor Act, is valid, because supported by substantial evidence.

5. That court erred in stating that it is clear from the record that the evidence upon which the report of the Commission of November 7, 1936, was incomplete and inadequate, in the absence of any opposition to the contentions of petitioner, and in failing to find that the additional evidence introduced before the Commission on the further hearing showed no material or substantial change in the physical or functional characteristics of petitioner.

THE STATUTE.

This case involves the construction of the Railway Labor Act, as amended June 21, 1934 (45 U. S. C. A., Secs. 151-163); and of Sections 13(2), 16(6) and 16a and 17(4) of the Interstate Commerce Act.

QUESTIONS PRESENTED.

The questions presented for determination are:

1. The power, authority, and function of the Interstate Commerce Commission under the Railway Labor Act, as amended June 21, 1934;

2. Whether the Commission had the authority under the Railway Labor Act or under any provisions of the Interstate Commerce Act, to reopen for reconsideration, on its own motion, a decision theretofore made by that Commission under the Railway Labor Act upon the request of the National Mediation Board;

3. Whether the determination made by the Commission on July 11, 1939, as the result of the further hearing that petitioner is not an interurban electric railway and that it is operated as a part of the general railroad system of transportation is supported by substantial evidence, is ar-

bitrary and capricious and not in accordance with applicable rules of law;

4. Whether the court below erred in refusing to reverse the judgment of the court of original jurisdiction in this proceeding.

SUMMARY OF ARGUMENT.

1. Even though the authority to make a determination as to the status of the petitioner under the Railway Labor Act, was validly conferred upon the Commission by that act, the question as to whether the Commission acted within its authority is a proper subject of judicial review (*Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 127).

2. Unlike the Interstate Commerce Act, the Railway Labor Act confers no administrative or supervisory authority upon the Interstate Commerce Commission. Under the Railway Labor Act the Commission has no authority to make a determination as to the status of an electric railway until and unless it is requested to do so by the National Mediation Board or upon complaint of an interested party. As was stated by this court in *Shannahan* v. *United States*, 303 U. S. 596, a decision by the Commission under the Railway Labor Act is not an order and the only action which could ever be taken on such a determination would be by some other tribunal. Therefore, when the Commission, on November 7, 1936, determined at the request of the National Mediation Board, after hearing, that petitioner fell within the exemption provisions of the Railway Labor Act, the authority of the Commission under that act was exhausted and the Commission had no right, on its own motion thereafter, to reopen that case and to consolidate it for further hearing with other cases. There is no provision in the Railway Labor Act similar to Section 13(2) of the Interstate Commerce Act which confers authority on the Commission to institute an investigation on its own motion "as to any matter or thing concerning which a *complaint* is authorized

to be made * * *." Even under Section 16(6) of the Interstate Commerce Act which authorizes the Commission "to suspend or modify its orders upon such notice and in such manner as it shall deem proper," the authority is limited to orders still under its control (*Louisville & Nashville R. R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217). The order of the Commission of February 5, 1938, which purported to reopen its determination of November 7, 1936, and its determination of July 11, 1939 are null and void and of no effect. While the doctrine of *res adjudicata* may not control decisions of the Commission, this court has said that the Commission is bound to recognize the validity of the rule of conduct prescribed by that doctrine (*Arizona Grocery Co.* v. *A. T. & S. F. R. Co.*, 284 U. S. 370).

3. The determination by the Commission of July 11, 1939, that the North Shore does not fall within the exemption proviso of the Railway Labor Act, is not only contrary to its determination made on substantially the same facts, of November 7, 1936, but is arbitrary, capricious, contrary to the evidence, and contrary to applicable rules of law. The court may review and set aside a determination made by the Commission under these circumstances (*Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177).

4. In the *North Shore* case; in *Piedmont & Northern R.* v. *I. C. C.* 286 U. S. 299; and in *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 127, this court clearly indicated that prior to 1920, the phrase "interurban electric railway" was not commonly used to designate a carrier whose *major activity* was the transportation of interstate freight. Those decisions also recognize that an electric railway does not cease to be an interurban electric railway merely because, in addition to its passenger business, it handles interstate carload freight in standard freight cars. The major and dominant activity of petitioner is the transportation of passengers. For these reasons, the determination made by the

Commission of July 11, 1939, is arbitrary, capricious, contrary to the evidence and contrary to the statute.

5. In its determination of July 11, 1939, the Commission considered facts and circumstances which could not legally influence its conclusions. That determination should therefore be set aside. (*St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38.) The report of the Commission of July 11, 1939, shows that it was improperly influenced by the fact that the labor organizations which represented the employes of the North Shore took a different position with respect to the status of that carrier under the Railway Labor Act, in the consolidated proceeding, from the position taken by that organization in the proceeding out of which the determination of November 7, 1936, was made. The Commission was also influenced by the fact that, in the second proceeding, the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen intervened and supported the position of the employes of the labor organization of the North Shore. The Commission should not have permitted itself to be influenced to any extent by the identity or importance of the parties concerned, nor by the desire of one party over another, nor by any results which might be beneficial or otherwise. Only by a tortured construction of the statute and of the evidence, could the determination of July 11, 1939, be made by the Commission.

6. The determination by the Commission of July 11, 1939, that the North Shore is operated as a part of "the general steam railroad system of transportation," is contrary to the statute and is arbitrary and capricious. This determination by the Commission is based solely on the ground that the North Shore interchanges carload freight with steam railroads, and maintains through freight rates with such railroads. The proviso in Section 1, First, the Railway Labor Act excludes "street, interurban or suburban electric railways, unless such railway is operated as a part of a general steam railroad system of transportation, but

shall not exclude any part of the general steam railroad system of transportation now or hereafter operated by any other motive power. The Commission did not find that the North Shore is operated as a part of *a* general steam railroad system of transportation, but found that it is operated as a part of *the* general steam railroad system of transportation. The first clause obviously refers to an electric railway. The second clause does not refer to electric railways, as such, but refers to parts of a general steam railroad system such as the Pennsylvania Railroad, the New York Central, and other railroads engaged in general transportation. The Commission construed the second clause of the proviso to contemplate a national railroad system of transportation. There is no such thing in America as a national steam railroad system of transportation. Such system as exists is composed of separately operated and separately incorporated railroad systems. The word "system" was used by Congress to embrace an operating relationship and unity, involving common control, common management, and operation as a system. *Piedmont & Northern* v. *United States,* 30 F. (2d) 421; *St. Louis & O'Fallon* case, 124 I. C. C. 3, 10; *Michigan United Railway case,* 67 I. C. C. 452; *Sacramento Northern Ry. case,* 71 I. C. C. 653; *Hudson & Manhattan R. Co.* v. *Hardie,* 103 F. (2d) 327, certiorari denied 307 U. S. 640; *New York, Westchester & Boston Ry.,* 218 I. C. C. 253. As was aptly stated by the three-judge court in the *Piedmont & Northern* case, the word "general" as used in the statute, refers to the *kind* of transportation performed, that is, whether the service performed by the railroad was *special, local* or *general.*

ARGUMENT.

The Interstate Commerce Commission Exceeded Its Statutory Authority in Purporting to Reopen and Reconsider Its First Determination.

The nub of this question is fairly dealt with in Paragraph 2 of the Summary of Argument. It is sufficient to say, at this point, that none of the decisions relied on by the defendant, and by the court below, as authority for the proposition that an administrative tribunal, such as the Commission, may reopen cases on their own motion without affirmative statutory authority, to correct errors, etc., deal with a situation similar to the one here presented. We recognize that it is settled that a tribunal like the Commission may reopen and reconsider decisions on their own motion, to correct errors, made in cases where such tribunals have continuing administrative authority. All of the cases cited by defendants are of that character. For example, they rely on: *Ford Motor Company* v. *National Labor Relations Board*, 305 U. S. 364; *Fly* v. *Heitmeyer*, 309 U. S. 146; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 240; *Louisville & Nashville R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 317, and several decisions of the Interstate Commerce Commission.

In each of these cases, the administrative agency dealt with a subject as to which it had administrative and continuing authority. In the *Sloss-Sheffield* case, this court recognized that the Commission had the authority to suspend or modify its orders but said that such authority is limited to orders still under its control. Under the Railway Labor Act the Commission has no administrative authority and, in fact, has no authority to determine the status of an electric line under that act, unless the Mediation Board requests it to do so, or unless a complaint is filed by an interested party. After its decision of November 7, 1936, which determined the North Shore to be an interurban electric railway, excluded from the provisions of the Railway Labor

Act, no party requested the Commission to reopen or reconsider that decision. The Commission did so on its own motion and then consolidated the reopened proceeding with other proceedings which had arisen under the Railroad Retirement Act and the Carriers' Taxing Act. Under these circumstances, it is our contention that when the Commission made its determination on November 7, 1936, it exhausted its authority over that subject-matter and did not thereafter have any right to reconsider that determination on its own motion.

The Determination by the Interstate Commerce Commission of July 11, 1939, in the Consolidated Proceeding That the North Shore is Subject to the Railway Labor Act is Arbitrary, Capricious, Contrary to the Evidence, and Contrary to the Law.

Interurban electric railways, as distinguished from street car railways, are subject to all of the Federal laws, including the Interstate Commerce Act, which apply to common carriers by railroad except the provisions which exclude them. (*Omaha & Council Bluffs Street Ry. Co.* v. *I. C. C.*, 230 U. S. 324; *Spokane & Inland Empire R. R. Co.*, v. *U. S.* 241 U. S. 344; *U. S.* v. *Hubbard*, 266 U. S. 474.) Since 1916, and more particularly since the passage of the Transportation Act of 1920, Congress has seen fit to exclude street, suburban and interurban electric railways from certain provisions of the Transportation Act and of other regulatory statutes because they were not considered as within the mischief sought to be corrected or the purposes sought to be achieved by such provisions.

The meaning of the phrase "street interurban or suburban electric railway", as used in the Railway Labor Act, is not defined. In considering the meaning of that phrase in its report of July 11, 1939 (R. 28-42), the Commission practically held that the phrase is limited to electric lines which handle passenger traffic and do not interchange interstate carload freight with steam railroads. This is an

unwarranted and arbitrary interpretation of the statute. Moreover, it is contrary to the decisions of this court which deal with the subject. It is also contrary to the historic and legislative meaning of the phrase. As early as 1902 the United States' Census Reports showed that the term "interurban electric railway" was applied to electric lines which were then rapidly developing and which carried freight, express, mail, and passengers (R. 460-462). In fact the Census Reports for the years 1907, of 1912, and of later years, emphasize that interurban electric lines operated long freight trains over private rights-of-way, and at high speeds, and that these lines rivaled the main-lines of steam railroads (R. 461). That fact was also recognized by this court in the *Omaha and Council Bluffs* case, and in the *Spokane and Inland Empire* case, long before Congress used the term "interurban electric railway" in the Interstate Commerce Act, and that fact was also recognized by the Commission in numerous decisions between 1907 and 1915. *Chicago & Milwaukee Electric R. Co.* v. *I. C. Railroad Co.*, 13 I. C. C. 20; *Chicago, Ottawa & Peoria Ry. Co.* v. *C. & N. W. R. Co.*, 33 I. C. C. 573; *Cincinnati & Columbus Traction Co.* v. *B. & O. SW. R. R. et al.*, 20 I. C. C. 486; and *St. Louis, Springfield & Peoria R. R. Co.* v. *P. & P. U. Ry. Co.*, 26 I. C. C. 226.

As Congress did not see fit to define the term "interurban electric railway" it must be assumed that it used the term in the sense that it had been used by the courts, by the Commission, and other state and Federal agencies. The authorities referred to show that before Congress used the term in federal statutes it had been commonly used to include electric lines which operated between urban communities over private rights-of-way, as well as over city streets, and which carried freight, mail and express, in addition to passenger traffic.

It is arbitrary for the Commission to say that an interurban electric line ceases to be such if it engages in the transportation of freight, and participates in through rates and interchanges carload freight traffic with steam railroads.

In the *Omaha and Council Bluffs* case, decided in 1913, this court considered a decision of the Interstate Commerce Commission, which held that the Omaha and Council Bluffs Street Electric Railway was subject to the Act to Regulate Commerce because the term "railroad" in that act was unqualified as to motive power. The court held against the Commission and said that the term "railroad" as used in that act cannot be construed to include a street railway, and apropos of the contention made by the Commission with respect to the development of a new type of electric railway, the court said:

> "But it is said that since 1887, when the act was passed, a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight."

A careful reading of the second report of the Commission (R. 28-42), in the light of the unusual circumstances surrounding this case, warrants the inference that the Commission was improperly influenced by the attitude of the labor organizations and by certain inconsequential facts, which were added to the record in the second hearing, and which were seized upon and emphasized by the Commission to support a conclusion different from its first conclusion, but one that was in accord with its plainly disclosed policy of bringing about a result which, in the opinion of the Commission, would be benefical to the employees of petitioner under the Railroad Retirement Act.

Throughout this proceeding the defendants and the Commission have placed great emphasis on the fact that the original determination of the Commission was made in a nonadversary proceeding while the second determination was made in an adversary proceeding, the latter resulting, as the defendants say, in the introduction of more compre-

hensive facts, which they claim justified the different conclusion reached by the Commission.

The court below was misled by the emphasis placed upon this aspect of the case. In the opinion of Judge Sparks (R. 577), the statement is made that "it is clear from the record that the evidence, upon which the original report was based, was very incomplete and inadequate, in the absence of any opposition to the contention of the North Shore." With due deference to the court below, we submit that there is absolutely no justification for that statement. We repeat that when the entire record is examined it will be found that none of the additional evidence introduced at the second hearing is of a character which showed any material or consequential change in either the functional or physical characteristics of the petitioner. This evidence, if viewed judicially, does not warrant a different conclusion from the conclusion originally reached by the Commission on the original record. The fact that the first proceeding was nonadversary, is also without significance. Some of the most important and far-reaching decisions of the Interstate Commerce Commission are made in nonadversary proceedings. Moreover, the examiner who presided at both the original and the second hearing, had presided at practically every proceeding which has arisen before the Commission under the Railway Labor Act, and related acts. The examiner knew, from the intimate experience thus gained, that certain essential facts should be developed at each of them, irrespective of whether there were opposing parties, and that he had the right and the duty to see to it that all material facts were developed. It should also be kept in mind that in the prosecution of the case, which resulted in the decision of this court in *United States* v. *Chicago, North Shore & Milwaukee R. Co.*, 288 U. S. 1, the government had access to all of the records of the North Shore and that all essential facts, including interchange arrangements, with respect to the carrier, were developed in the trial of that case and were before this court when

its decision was made. The record here shows that there has been no material change in the essential facts with respect to the functional or physical characteristics of the North Shore since that time.

The material and outstanding physical and functional characteristics of the petitioner are shown to have been the same by the evidence before the Commission in both proceedings. But, to give effect to its conclusion the Commission, in its second report emphasized such inconsequential matters as the fact that in the original report the statement was made that petitioner had main-line grades of 7 per cent, whereas it was shown at the consolidated hearing that the maximum main line grade is 5.85 per cent for a distance of 1400 feet north of Harrison Street in Milwaukee, and that there are no curves on the Skokie Valley Line north of Buena Park which hinder the movement of freight cars. Petitioner did not, at any time, claim that standard freight cars could not be handled north of Buena Park on the Skokie valley line. The testimony of record (R. 357) shows that there are many curves in the main-line track as well as in the shop and yard tracks of 100 foot radius or less; and that this character of curvature in track is common to electric railways, which must operate around street corners, and that trains of steam railroads could not operate around such curves (R. 357, 378). The record also shows that there are some very sharp curves at Dempster Street on the Skokie valley line.

It was shown at the original hearing that petitioner interchanged carload freight with steam railroads at several points and handled a substantial number of cars of carload freight each year. This was also shown in the record on which the decision of this court was made in the North Shore securities case. The Commission and the government make much of the fact that in its original report the Commission stated that no carload freight is handled to or from or interchanged at, either of the "two principal terminals" of petitioner, whereas it was disclosed at the second hearing that carload freight is interchanged by peti-

tioner with one steam railroad at Buena Park within the corporate limits of Chicago.

As nearly 80 per cent of the business of the North Shore consists of the transportation of passengers, and as the two principal passenger terminals of the petitioner are located in the down-town sections of Chicago and of Milwaukee, the statement in the first report of the Commission on this subject is correct (R. 170). In other words, it is a fact, as stated by the Commission, in that report, that carload freight cannot be handled or interchanged by petitioner at either of its "two principal terminals."

As it was shown at the first hearing that petitioner interchanged carload freight with steam railroads at several points, it is of no material significance that through inadvertence it was not shown at the first hearing that one of the interchange points was Buena Park, located within the corporate limits of Chicago. In their desire to feature this aspect of the case the defendants have sought to create the impression that petitioner has general interchange facilities for the interchange of freight within the city of Chicago, whereas the facts as shown by the testimony of witness Fallon, chief executive officer of petitioner, are that the interchange facilities at Buena Park are limited and are maintained under special conditions (R. 376-379).

Carloads of freight received by petitioner at Buena Park are handled to a point outside the limits of Chicago by the Chicago Rapid Transit Company, as agent for petitioner, over specially constructed gauntlet tracks which utilize the right-of-way also used by the passenger trains of the Rapid transit company in its mass movement transportation. This freight is handled by the Rapid transit from Howard Street, which marks the city limits of Chicago to Prairie Road on the Skokie valley line, a distance of about 2½ miles (R. 377). The service is highly restricted, as is the traffic. The traffic is restricted to shipments received from the Chicago, Milwaukee, St. Paul and Pacific Railroad in Chicago. The ordinary interchange arrangements between steam railroads in Chicago permits each of the railroads to enjoy the

facilities of the full switching district of Chicago (R. 377).

The interchange tracks are at the foot of a 2 per cent grade. There are no team-track facilities at this point. There is no opportunity for the consignee to receive the freight on these tracks. The movement from Howard Street to Prairie Road is over a complicated network of interlocking plants. The lead-up from the northbound track or the track that runs to Evanston, to the track that reaches the Skokie Valley branch, are through five switches which have about 21 degree curvature, and thence they go down a 3 per cent grade and up that grade in the opposite direction (R. 377-378). This service is at the sufferance of the Milwaukee railroad. The contract under which petitioner uses the track of that railroad provides for the operation of carload freight over these tracks. The Milwaukee has the right to cancel the contract at any time (R. 378-379). No cars containing less-than-carload freight are interchanged at Buena Park, nor has petitioner reciprocal switching arrangements with any steam railroad, either in Chicago or Milwaukee, or at any point other than at Racine, Wis. On the other hand, reciprocal switching arrangements are generally maintained by steam railroads at all interchange points (R. 379).

In its second report the Commission repeated the statement made in its first report to the effect that the North Shore has seven electric locomotives weighing from 50,000 to 70,000 pounds each, and then stated that it was not pointed out, however, in its previous report that two or more of these locomotives can be coupled together so as to afford a proportionately greater hauling capacity, and that when so coupled trains of as many as 50 cars are hauled (R. 529). There is nothing novel in this practice. The occasional use of two locomotives is for reasons of economy and efficiency.

Florida East Coast R. Co. v. *United States*, 234 U. S. 167; 58 L. Ed. 1267, is a case involving a situation wherein the Interstate Commerce Commission in one proceeding

approved certain rates as lawful and in a later case reversed itself. The carrier contended that there was no evidence in the second proceeding to support the reversal. In that case Mr. Chief Justice White said:

> "While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding, and may not be re-examined in the courts, it is undoubted that where it is contended that an order whose enforcement is resisted was rendered without any evidence to support it, the consideration of such a question involves not an issue of fact, but one of law, which it is the duty of the courts to examine and decide. (Citing cases.)
>
> "In view of what we have said concerning the state of the record, the solution of the question must depend upon an examination and analysis of two subjects: the one, the reports of the Commission in the previous cases, and the other, the testimony which was before it and the report made in this case. * * *"

An examination of the recitals in the second report of the Commission of the additional facts developed on the further hearing show, that the distinctions sought to be made by the Commission in the two records, are distinctions without real differences or significance. The additional facts do not warrant the conclusion reached by the Commission. The functional and physical characteristics of a railroad like the North Shore do not change with the ebb and flow of the tides—they are more or less constant. A proper regard for the rights of the North Shore and of its employees demands stability in determinations of this kind. In the *Utah Idaho Central* case, this court said that a determination by the Commission, responsive to the requirements of the statute, is binding on both the Mediation Board and the carrier. The first determination of the Commission is of that character. While the doctrine of *res adjudicata* may not control decisions of the Commission, this court has said that the Commission is bound to recognize the validity of the rule of con-

duct prescribed by that ~~document~~ DOCTRINE. *Arizona Grocery Co.* v. *A. T. & S. F. R. Co.*, 284 U. S. 370, at 389. If the Commission may completely ignore that doctrine, and may, on its own motion, as was done here, make two different determinations of the same railroad on substantially the same facts, in the course of approximately two years, there is no reason why the Commission may not make an unlimited number of varying determinations at any time it chooses to do so.

During the past ten years, this court has decided four cases which involve the meaning of the phrase "interurban electric railway" not operated as a part of the general steam railroad system of transportation, as used in the Interstate Commerce Act, and in the Railway Labor Act. These cases are: *Piedmont & Northern* v. *I. C. C.*, 286 U. S. 299; *U. S.* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1; *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177; and *Texas Electric Railway Co.* v. *Eastus*, 25 F. Supp. 825, aff. *per curiam* 308 U. S. 512. In addition, the Circuit Court of Appeals, Seventh Circuit, has decided *Chicago South Shore & South Bend Ry. Co.* v. *Fleming*, 109 F. (2d) 419 and the Circuit Court of Appeals, Second Circuit, has decided *Hudson & Manhattan* v. *Hardie*, 103 F. (2d) 327, certiorari denied 307 U. S. 640.

The *Piedmont & Northern* case arose on a suit by the Interstate Commerce Commission to enjoin that railroad from constructing a line of railroad without a certificate as is required by railroads subject to section 1 (18-22) of the Interstate Commerce Act. Paragraph 22 of that section provides that the authority of the Commission shall not extend to "street, suburban or interurban electric railways, which are not operated as a part of a general steam railroad system of transportation." In that case the court held that the Piedmont & Northern, whose major activity was the transportation of interstate freight, was not an interurban electric railway. It said, among other things, at page 307:

> "It is clear that the phrase 'interurban electric railway' was not, in 1920, commonly used to designate a carrier whose *major activity* was the transportation of interstate freight in trains of standard freight cars."

The *North Shore* case arose on a suit by the government to enjoin the North Shore from issuing securities under section 20 (a) of the Interstate Commerce Act without the approval of the Interstate Commerce Commission. That section excludes from the definition of the term carrier "a street, suburban or interurban electric railway which is not operated as a part of a general steam railroad system of transportation." In that case the court held that the North Shore is an interurban electric railway, and not otherwise subject to Section 20 (a). It found no difficulty in distinguishing the North Shore from the Piedmont & Northern. After reciting that the North Shore handled freight with electric locomotives, interchanged carload freight with steam railroads, participated in more than 1,000 joint freight rates with steam railroads, and that only 22 per cent of the total revenue from the North Shore was derived from freight traffic, the court said:

> "We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier. The facts differentiate the present case from *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299. There the railway was predominantly a carrier of interchange carload freight, and the proposed extension of line, which was the subject of that litigation, had as its object the creation of a link in a trunk-line route composed of the electric line and a number of steam railroads, which would divert from other steam railroad trunk-line routes some $4,000,000 of revenue annually. The purely local traffic in freight, passengers, baggage, and express was there relatively inconsequential; but here greatly preponderates. * * *"

It will be observed that in distinguishing the North Shore from the Piedmont & Northern the court stressed the fact that the latter was predominantly a carrier of interchange carload freight, whereas the North Shore was predominantly a carrier of passengers. It is still such a carrier.

The *Utah Idaho Central* case was the first case decided by this court under the Railway Labor Act. In the opinion in that case the court said, as to the term "interurban" at pages 180 and 181:

> "Congress did not define the term 'interurban.' Despite the desirability of such a definition and the difficulties occasioned by its absence, the term is not so destitute of meaning that it can be denied effect as a valid description. Respondent's standing upon exception necessarily treats it as valid and hence as susceptible of application. The view presupposes that the term 'interurban' denotes distinguishing factual characteristics which on appropriate inquiry may be ascertained. We have so treated the term in other relations." *Piedmont & Northern R.* v. *I. C. C.* 286 U. S. 299; *U. S.* v. *Chicago North Shore & Milwaukee,* 288 U. S. 1.

The court also held that a determination by the Commission under the Railway Labor Act is binding on both the carrier and the other interested parties, if made after hearing, is supported by substantial evidence, is not arbitrary or capricious and does not violate applicable rules of law. The court made it clear that the Commission's determination would not be binding if arbitrary or capricious, or contrary to applicable rules of law.

In the *Utah Idaho Central* case the government conceded that the railroad had certain characteristics of an interurban railroad. In dealing with these matters the court said at page 186:

> "The passenger business, however, yields but a minor part (about 18.1 per cent) of the total revenues. During the five years from 1930 to 1934, inclusive, the freight revenues amounted to $2,021,724.57 and the revenues from passengers, mail and express were

> $448,941.62. *The railway is predominantly a carrier of freight.*" (Italics ours.)

Here, as in the *North Shore* and in the *Piedmont & Northern* cases, the court recognized that an electric line which is predominantly a carrier of freight is not within the category of an interurban electric railway. After emphasizing the fact that the Utah Idaho Central was predominantly a carrier of freight and that its passenger business was relatively small, the court in sustaining the Commission said at page 187:

> "* * * the Commission performed its duty in weighing the evidence and in reaching its conclusion in the light of the dominant characteristics of respondent's operations which were fairly comparable to those of standard steam railroads."

This court sustained the decree of the three-judge court in the *Texas Electric* case by a *per curiam* order. The defendants rely upon the *Texas Electric* decision to support their contention that the fact that the passenger traffic predominates on the North Shore is not controlling. There is nothing in the decision in that case to warrant that view. Such a view completely ignores and disregards the emphasis given by this court to the predominance of passenger or freight traffic as the case may be, in the *Utah Idaho Central*, the *North Shore* and the *Piedmont & Northern* cases. Defendant's contention is but another way of saying that no standard has been set up by the Railway Labor Act as a guide to the Commission and that it has a roving authority to act in each case according to its whim or caprice. However, the facts with respect to the Texas Electric and the North Shore are not the same. In the *Texas Electric* case the government was represented by the same counsel as represents the defendants here. At page 18 of their brief in this court they stated that the Texas Electric derived 37 per cent of its total revenue from freight traffic, 58 per cent from freight, express and mail traffic, and 41 per cent from passenger traffic, excluding local street car traffic.

In the same brief counsel also emphasized that the Texas Electric "* * * can no longer be regarded as predominantly a passenger line * * *".

But the defendants say that in any event *Hudson & Manhattan R. Co.* v. *Hardie,* 103 F. (2d) 327, cert. denied 307 U. S. 640, supports their contention that the predominance of passenger traffic is immaterial. All of the traffic of the Hudson & Manhattan was passenger traffic. That case arose under the Railway Labor Act. The District Court had held that the Commission's determination was invalid. 22 Fed. Supp. 105. The Circuit Court of Appeals reversed that decision and sustained the Commission upon the ground, as stated by the Court at page 328 of its opinion:

> "The determination by the Interstate Commerce Commission that the Railway Labor Act did apply to the plaintiff was put on the ground that although it *was an interurban electric railway,* it was operating as a part of a general railroad system of transportation." (Italics ours.)

The report of the Commission in the *Hudson & Manhattan case,* 216 I. C. C. 745, at 746, 752, 753, shows that the Hudson & Manhattan had certain operating contracts with the Pennsylvania Railroad which referred to the former as a tunnel railroad, and that the Hudson terminal was regarded as a downtown terminal for the Pennsylvania and the Lehigh Valley railroads. The Commission emphasized the fact that the Hudson & Manhattan was under federal control during the entire period of such control and that no changes had occurred to give the carrier a different status since it was under federal control. These facts support the view that although the Hudson & Manhattan was held to be an *interurban electric railway because of its predominance as a passenger carrier,* it was nevertheless held subject to the Railway Labor Act since it was operated as a part of the Pennsylvania Railroad system of transportation. It will thus be seen that the *Hudson & Manhattan* case supports our contention and not the contention of the defendants.

Defendants may also contend that the decision of the court below in the *Chicago South Shore & South Bend* case, 109 Fed. (2d) 419, requires an affirmance of the judgment of that court in the case at bar. In that case, Judge Sparks recited that the elements which must be considered by the Commission in reaching its determination are set forth in the *Utah Idaho Central* case. He then referred to the fact that the South Shore had been reorganized under section 77 (m) of the Bankruptcy Act, which defined the term "railroad corporation" as not including a street, suburban or electric interurban railway which is not operated as a part of a general railroad system of transportation "or which does not derive more than 50 per cent of its operating revenue from the transportation of freight in standard steam railroad freight equipment." The South Shore derived more than 50 per cent of its operating revenue in that manner. Judge Sparks then concluded at page 420:

> "Having brought itself within the definition of railroad for that purpose, we think it cannot now deny similar classification for the purposes of the Railway Labor Act. This, we think, constitutes substantial evidence in support of the Board's determination and we are not permitted to disturb it."

Sections 1 (4) and 3 (4), of the Interstate Commerce Act, impose upon common carriers by railroad, irrespective of whether they are interurban electric railroads, the duty to establish reasonable through routes and through rates, and reasonable and equitable facilities for the operation of such through rotues, and for the interchange of equipment. The petitioner does not forfeit its character as an interurban electric railway merely because it has complied with the duties imposed upon carriers of its class by having established through routes and interchange arrangements with steam railroads *U. S.* v. *Munson S. S. Line*, 288 U. S. 43. Nor can it be assumed that Congress did a vain and futile thing in using the term "street, interurban or suburban electric railway" in the Railway Labor Act and in certain

provisions of the Interstate Commerce Act. If the decision of the Commission is sustained the effect will be practically to nullify these exceptions as applied to petitioner, and to nullify the effect of the decision of this court in *U. S.* v. *Chicago North Shore and Milwaukee R. Co.*, 288 U. S. 1, in which the court squarely held that petitioner is a "typical example of an interurban electric railway," as Congress used the term.

The court below did not even discuss the significance of the decision of this court in the North Shore case or in the other cases cited. It merely held that the Commission was not bound by the decision of this court in the North Shore case. If the Commission, in a case of this character, is not bound by decisions of this court, which declare the statutory demarcation between electric lines which are interurban electric railways and electric lines which are not, it follows that the Commission is not bound by any rule but is free to reach any conclusion on this question that may suit its whim or caprice at a given time.

Counsel for defendant attempt to overcome the effect of the decision of this court in the North Shore case upon the ground that the court was influenced by equitable considerations growing out of the fact that petitioner had issued securities during a period of over ten years without the approval of the Commission but with its knowledge and tacit acquiescence, and that in its opinion the court recognized that the case was not free from difficulty. It is true that, in the North Shore case the court did point out that the decision on the question was not free from difficulty, but the opinion nevertheless states that even if the status of the North Shore were a matter of first impression it would have held that Section 20a was inapplicable to that carrier.

Every important characteristic of the North Shore which was shown in the record before this court in the North Shore case has remained unchanged. None of the facts before the Commission in either of the proceedings to which reference has been made show any material or consequen-

tial change in the dominant physical or functional characteristics of the North Shore. Therefore, consistency and justice requires that this court reach the same conclusion in the instant case it reached in its decision of January, 1933.

Moreover, the same equitable considerations which influenced the court in its previous decision are present here. As stated in the securities case, this court held that the North Shore is an interurban electric railway, excluded from the provisions of Section 20(a) of the Interstate Commerce Act. If the court should now hold that the North Shore is not an interurban electric railway the effect of such a decision would be to make void the securities that have been issued by that carrier, without the approval of the Interstate Commerce Commission and, under such a decision, it would be required to pay taxes under the Carriers' Taxing Act instead of under the Social Security Act and it would also be subject to the provisions of the Railroad Unemployment Insurance Act. In the light of the previous decision of this court, of the conflict in the two decisions of the Commission, of the conflict between the decision of the court below, and the decision of the Circuit Court of Appeals in the Hudson and Manhattan case, confusion as to labor relations and as to other matters will result, unless this court grants certiorari and decides the issues involved.

The Determination by the Commission in Its Second Report That Petitioner is Operated as a Part of the General Steam Railroad System of Transportation is Contrary to the Statutes and is Arbitrary and Capricious.

As we have shown, in its second determination, the Commission found that the North Shore is not a street, interurban or suburban electric railway, as that phrase is used in the Railway Labor Act. It also decided that the North Shore is operated as a part of "the general steam railroad system of transportation." The part of the provision of Section 1. First., of the Railway Labor Act, pertinent to that finding, and to this discussion, reads as follows:

"Provided, however, that the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operated as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power."

It will simplify an understanding of the question if the clauses in the proviso are broken down. The proviso exempts a street, interurban or suburban electric railway:

(a) unless such railway is operated as a part of a general steam railroad system of transportation,

(b) but shall not exclude any part of the general steam railroad system of transportation, now or hereafter operated by any other motive power.

The words "such railway" in the first clause clearly refers back to a street, interurban or suburban electric railway. Such railways are exempt from the act unless they are operated as a part of a general steam railroad system of transportation. The second clause does not refer to street, suburban or interurban electric railways, as such, but refers to parts of the general steam railroad system, such, for example, as the Pennsylvania Railroad, the New York Central Railroad, and other steam railroad systems which operate parts of their lines by motive power other than steam, and which parts have never been described by the term "interurban." The second clause was put in the amendment to the Railway Labor Act of June 1934 to make certain that no part of a general steam railroad system of transportation would be excluded from the act, merely because at the time the amendment was made or in the course of events, such parts should be operated by power other than steam.

The Commission has decided, in a number of cases, that the word "system" as used in phrases of this character, was designed to embrace an operating relationship and

unity, involving (1) common control, (2) common management, and (3) operation as a system. *St. Louis & O'Fallon* case, 124 I. C. C. 3; *Michigan United Railway* case, 67 I. C. C. 452; *Sacramento Northern Ry. case*, 71 I. C. C. 653; *New York, Westchester & Boston Ry.*, 218 I. C. C. 253; and *Chicago South Shore & South Bend* case, 214 I. C. C. 167. The last two cases were decided after the amendment to the Railway Labor Act of June 1934.

Piedmont & Northern v. *United States*, 30 F. (2d) 421, a decision by a three-judge court, contains a comprehensive and pertinent discussion of the meaning of these phrases. In that case the court agreed with the Commission's interpretation of the word "system" and said that the word "general" as used in the phrase obviously refers to the *kind* of transportation performed, that is, whether the service performed by the railway was *special, local* or *general*. Congress used the word "general" in the same sense in Section 204 and Section 209 of the Transportation Act of 1920 and in Section 15(a) as enacted that year. The Circuit Court of Appeals, Second Circuit, used the phrase in the same sense in *Hudson & Manhatton R. Co.* v. *Hardie*, 103 F. (2d) 327, certiorari denied 307 U. S. 640.

In its second determination, however, the Commission gave the second clause in the proviso a meaning which is contrary to numerous previous decisions and one not warranted by either the language or the spirit of the statute. The Commission concedes that the phrase in the first clause "unless such railway is operated as a part of a general steam railroad system of transportation" means a particular railroad system of transportation. But it construes the second clause in the proviso, which is the same as the first, except in the second clause the word "general" is preby ceded "the" instead of by "a", as embracing a national transportation system, that is, a composite system made up of all of the steam railroads of the country. Upon that hypothesis it assumed that if any electric line had interchange or through freight rate arrangements with steam railroads,

the electric line, on that account, became a part of the national steam railroad system of the country.

It would be difficult to conceive of a more strained and distorted construction of the law when the language and the purpose of the proviso is kept in mind. There is no such thing in America as a national system of transportation as the Commission used the term. Such railroad system or systems as exist are composed of separately incorporated and separately operated railroads. If Congress had meant to create a national system of transportation for the purposes of the administration of the Railway Labor Act, or had meant to bring interurban electric railways within the reach of that act, merely because they maintain interchange and through rate arrangements with steam railroads, it certainly could have found language more adapted to express that thought.

By Section 5(4) of the Interstate Commerce Act, repealed September 18, 1940, the Commission was required to "adopt a plan for the consolidation of railway properties of the continental United States into a *limited number* of *systems*," and it adopted such a plan. *Consolidation of Railroads*, 159 I. C. C. 522. Although Section 5(4) embraced all common carriers by railroad, subject to the act, and did not exclude interurban electric railways, the Commission did not think the North Shore important enough even to consider it as a part of its plan of railroad consolidation. If there is existed a "general steam railroad system of transportation," in the sense the Commission used that phrase, there would have been no reason for Congress to have required the Commission to adopt a plan of consolidating the railway properties into a *limited number* of *systems*.

The Commission misinterpreted and misapplied the statute and, to the extent that the court below sustained that interpretation, it erred.

CONCLUSION.

In January 1933, this court held that the petitioner is an interurban electric railway. In November 1936, the Interstate Commerce Commission made a similar determination. In July 1939, the Commission purported to reverse its previous determination. The court below sustained the Commission, the effect of which is to hold that petitioner is not an interurban electric railway. These various decisions have created confusion and uncertainty as to the status of the petitioner, under the various Federal statutes, and as to its rights and the rights of its employees under certain of these statutes. The fact that competing labor organizations are parties to this proceeding is enough, without more, to show that confusion already exists in the labor relations of the petitioner. Certainty, in respect to these matters, can only be established by a decision of this court. For these and the other reasons stated, it is respectfully requested that the court grant the writ of certiorari petitioned for herein.

Respectfully submitted,

RALPH R. BRADLEY,
FREDERICK E. STOUT,
ROBERT E. QUIRK,
Attorneys for Petitioner.

September ——, 1941.

Address of Counsel:

RALPH R. BRADLEY, ESQ.,
FREDERICK E. STOUT, ESQ.,
209 South La Salle Street,
Chicago, Ill.

ROBERT E. QUIRK, ESQ.,
Investment Building,
Washington, D. C.

APPENDIX.

Operating Revenues of Chicago North Shore & Milwaukee For Years 1930-1937, Inclusive (Exhibits 51a, 54a-58a) (R. 479, 485-494.)

		Passenger* Revenue	Mail, Express and Miscellaneous Transportation Revenue	Freight Revenue	Switching Revenue	Percentage of **Freight to Total Transportation Revenue
1930	Local	$4,593,081	$60,663	$ 765,478	$1,860	
	Interline	113,774		557,546		
		4,706,855	60,633	1,323,024	$1,860	22.73%
1931	Local	3,608,188	44,537	492,041	444	
	Interline	57,815		414,569	1,848	
		3,666,003	44,537	906,610	2,292	24.43%
1932	Local	2,603,916	39,051	283,373	55	
	Interline	30,720		355,944	3,979	
		2,634,636	39,051	639,317	4,034	23.90%
1933	Local	2,568,372	43,496	242,225	293	
	Interline	25,664		376,395	812	
		2,594,036	43,496	618,620	1,105	20.36%
1934	Local	2,562,052	44,314	192,194	8	
	Interline	26,469		404,898	2,044	
		2,588,521	44,314	597,092	2,052	19.91%
1935	Local	2,487,781	45,847	147,042	5	
	Interline	29,153		486,926	2,462	
		2,516,934	45,847	633,968	2,467	21.33%
1936	Local	2,745,209	51,085	183,868	28	
	Interline	37,092		591,100	5,786	
		2,782,301	51,085	774,968	5,814	23.02%
1937	Local	2,788,181	47,723	229,229	36	
	Interline	36,693		582,293	2,481	
		2,824,874	47,723	811,522	2,517	23.38%

* Including baggage, parlor, sleeping-car, dining and special car revenue.
** Including mail, express and miscellaneous transportation revenue.

The average percentage of freight revenue to total transportation revenue for the 8 year period is 22.38 per cent.

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No. 592.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

A. A. SPRAGUE, Receiver for Chicago North Shore and Milwaukee Railroad Company, Petitioner,

vs.

J. ALBERT WOLL, United States Attorney for the Northern District of Illinois, Respondent,

and

INTERSTATE COMMERCE COMMISSION, DIVISION 900 OF THE AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA et al., Interveners-Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF

For Intervener-Respondent, Division 900 of the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America.

WM. B. RUBIN,
Attorney for Intervener-Respondent Division 900 of the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America.

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INTERSTATE COMMERCE COMMISSION, DIVISION 900 OF THE AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA et al., Interveners-Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF

For Intervener-Respondent, Division 900 of the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America.

OPINIONS BELOW.

Opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 574).

Opinion of the District Court of the United States for the Northern District of Illinois, Eastern Division (R. 544).

Report of the Interstate Commerce Commission (R. 523).

JURISDICTION.

July 22, 1941, decree of the Circuit Court of Appeals entered (R. 580).

August 18, 1941, appeal filed (R. 581).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Did the Circuit Court of Appeals err in upholding—

(a) The determination of the Interstate Commerce Commission that the North Shore was a part of a street railway system of distribution and subject to the provisions of the act;

(b) That the Commission had power to reopen a proceeding theretofore decided by it and reverse its earlier decision?

STATUTES INVOLVED.

Railroad Retirement Act of 1937:

Section 1, * * *

"(a) * * * Provided, However, that the term 'employer' shall not include any street, interurban, or suburban electric railway unless such railway is operating as a part of a general steam railroad system of transportation, but shall not exclude any part of the general steam railroad system of transportation now or hereafter operated by any other motive power."

Like provision in Carrier's Taxing Act of 1937 and Section 1, first paragraph of the Railway Labor Act, as amended 1934.

CHRONOLOGY OF PROCEEDINGS.

A.

THE PROCEEDINGS PRIOR TO NOVEMBER 6, 1937.

January 9, 1933. In **United States of America v. Chicago North Shore & Milwaukee Railroad Company**, 288 U. S. 1, 77 L. Ed. 583, an action to enjoin the Railroad Company, pursuant to paragraph 12, subdivision (1), of the Interstate Commerce Act as amended, as required by section 20 (a) of the act, adopted February 28, 1920, the Court held it to be an interurban, on the issue before it.

As we will show later, the decision in that case has no application to the present issue.

November 7, 1936. In a proceeding, **without contest**, objections or exceptions, before a division of the Interstate Commerce Commission, instituted at the request of the National Mediation Board, known as Case—Railway Labor Act, Docket No. 7, it held that the Chicago North Shore and Milwaukee Railroad Company fell within the terms of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934.

B.

THE PROCEEDINGS UPON WHICH THIS ISSUE WAS HEARD BEFORE I. C. C.

November 6, 1937. Division 900 of the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America filed complaint to determine their status under the Railroad Retirement Act of 1937, as employees of the Chicago North Shore and Milwaukee Railroad Company.

Special attention is called to paragraph VI of this intervener-respondent's complaint (R. 178).[1]

The proceeding is designated as Railroad Retirement Act, Electric Railway Docket No. 2.

January 29, 1938. The Receiver filed a motion to discontinue the proceeding.

Special attention is called to paragraph V of the answer to Receiver's motion to dismiss[2] (R. 192).

The Receiver's answer took no issue therewith.

February 25, 1938. Motion denied.

February 25, 1938. The Interstate Commerce Commission, Division No. 3, made its order[3] (R. 195).

April 18, 1938. Receiver made answer to the complaint in Electric Railway Docket No. 2.

October 27, 1938. The Examiner, the Honorable E. M. Steer, after hearing filed his report, wherein he found that the Chicago North Shore and Milwaukee Railroad Company did not fall within the terms of the exemption proviso in the first paragraph of Section 1 of the Railway

1 "* * * (2) The complaint, however, expressly omits from the foregoing offer any and all proof then submitted that organized labor has no opposition of record to the contention of the employer then made that the Railroad 'falls within the terms of the exemption proviso in the first paragraph of Section 1 of the Railroad Labor Act as amended June 21st, 1934.'"

2 "That the appearance was made for complainant in Docket No. 7 as an intervening party without its lawful authority. That the adjudication in that case in nowise directly affected its benefits and rights under the Railroad Retirement Act of 1937; that the defendant being then and there solely interested, and those appearing for the complainant in maintaining the status quo of the financial structure of the defendant railroad company and not otherwise; that the said Railroad Retirement Act of 1937 was enacted into law subsequent to the decision made in Docket No. 7."

3 "It Is Ordered, That Railway Labor Act Docket No. 7 be, and it is hereby, reopened by the division upon its own motion for further hearing in connection with the complaint in Electric Railway Docket No. 2 so that the status of the above named carrier, its receiver, and the employees may be considered and determined in the same proceedings and on the same record under the Railway Labor Act, the Railroad Retirement Act of 1937, and the Carriers' Taxing Act of 1937."

Labor Act as amended June 21, 1934, nor the corresponding proviso in Section 1 (a) of the Railroad Retirement Act of 1937, and the Carriers Taxing Act of 1937.

July 11, 1939. After an oral argument before the entire Interstate Commerce Commission, the Commission made its report in which it affirmed the report of the Examiner.

C.

THE PROCEEDINGS IN THE DISTRICT COURT AS THEY PERTAIN TO THIS INTERVENER-RESPONDENT, DIVISION 900.

August 9, 1939. Receiver filed petitions: for authority to continue to refrain from complying with provisions of Railroad Retirement Act of 1937 and Carriers Taxing Act of 1937, and for injunction restraining the United States District Attorney from prosecuting appellant for alleged violations of the Railway Labor Act (R. 2).

October 30, 1939. Order made permitting Division 900, etc., to intervene (R. 71).

November 18, 1940. Memorandum opinion by the District Judge (R. 544).

January 7, 1941. Findings of fact and conclusions of law (R. 548).

ARGUMENT.

A.

THE FINDING THAT THE NORTH SHORE[1] IS NOT WITHIN THE EXEMPTION PROVISO HAS SUPPORT IN EVIDENCE.

Throughout the record, for comparative analysis, eleven electric railroads[2] ruled to be more than interurban under the Railroad Labor Act as amended are considered.

The evidence in this case is best summarized in complainant's exhibits printed in the transcript of the record, pages 404 to 415, both inclusive, and by charts I and II (see appendix to this brief). Their inspection will in succinct, tabulated and graphic form bring to this Court the conclusiveness and correctness of the findings.

THE NORTH SHORE.

Its freight revenue exceeded the freight revenue of eight of the railroads ruled to be more than interurban (Ex. 36-A, R. 437; Ex. 37-A, R. 439).

---

1 The petitioner and appellant will be known as North Shore.
Shields v. Utah Idaho Central Railroad Company, 305 U. S. 177, 83 L. ed. 111, as the Utah Railroad.
Texas Electric Railway Company v. Eastus, 308 U. S. 511, 84 L. ed. 437, as the Texas Railroad.

2 Utah Idaho Central Railroad Company, 214 I. C. C. 707, 305 U. S. 177, 83 L. ed. 111;
Texas Electric Railway, 208 I. C. C. 193, 25 Fed. Supp. 825, 308 U. S. 511, 84 L. ed. 437;
Chicago, South Shore and South Bend Railroad, 214 I. C. C. 167, 109 Fed. (2d S.) 419;
Piedmont and Northern Railway Company, 211 I. C. C. 4, 286 U. S. 299, 76 L. ed. 1115;
Sacramento Northern Railway, 208 I. C. C. 203;
Waterloo, Cedar Falls and Northern Railway, 208 I. C. C. 211;
Fort Dodge, Des Moines & Southern Railroad Company, 211 I. C. C. 9;
Des Moines & Central Iowa Railroad, 214 I. C. C. 353;
Salt Lake and Utah Railroad Company, 214 I. C. C. 717;
Pacific Electric Railway Company, 215 I. C. C. 414;
Oklahoma Railway Company, 218 I. C. C. 123.

Its freight revenue was approximately twice or more than six of the eleven roads so ruled (Ex. 36-A, R. 437; Ex. 37-A, R. 439).

Its freight revenue per mile of road operated was greater than nine of the eleven roads that were ruled to be more than interurbans (Ex. 36-A, R. 437; Ex. 38-A, R. 441).

In the year 1936 its freight revenue exceeded the freight revenue of the Spokane International Railway Company, a Class 1 steam railway in the northwestern region (Ex. 39-A, R. 443).

As of the year 1937, the density of the freight traffic on its lines exceeded that on the lines of four of the twenty-five Class 1 steam railways of the northwest region (Ex. 39-A, R. 443).

Of the total carload freight handled by it in 1937, 99.1 per cent by tonnage was interchanged (Ex. 17-A, R. 414). This exceeds the percentage of freight interchanged by the Texas Electric Railway, which reported the greatest percentage of freight interchanged by any of the eleven comparable electric railways ruled to be more than interurbans (Ex. 18-A, R. 416).

Of the 36,014 cars of carload freight carried by it in 1937, 35,263 cars were interchanged, and of these 24,426 cars were received from steam railroads and transferred to steam railroads (Ex. 19-A, R. 417); 93.4 per cent of its total freight was handled in common with the steam railways, of which 99.4 per cent was carried in foreign equipment. Of this, 91 per cent moved in interstate commerce.

It excelled by far all other electric railways considered in connection with this exemption proviso. None of the electric railways ruled to be more than interurbans carried as great a percentage of freight in interstate commerce as

did the North Shore (Ex. 22-A, R. 421). In 1937 it carried between 96 and 97 per cent of its freight in standard equipment, and in that respect it excelled the other eleven roads.

The percentage of freight which was carload had increased 54 per cent in the proportion of freight handled in carload lots between 1930 and 1937. (See Exs. 51-A to 58-A, inclusive, R. 479-493; see Ex. 17-A, R. 414.)

In 1937 it earned $5,881.00 from freight revenue per mile of road operated, which was in excess of $221.00 over that of 1936 (Ex. 34-A, R. 435), and was in excess of $977.00 more than the eleven comparable electric railways ruled to be more than interurbans, for the year ending December 31, 1936 (Ex. 36-A, R. 437).

It exceeds the freight revenue of all but three of the eleven railroads listed (Ex. 37-A, R. 439).

NORTH SHORE—"The total revenue derived from the freight service to the total transportation service was approximately 23 per cent" (R. 493).

TEXAS RAILROAD—"That the revenues derived from the transportation of freight are exactly 20 per cent of the total transportation revenue of the carrier for the five-year period, and that the passenger revenue is more than three times the freight revenue" (Brief in Supreme Court, 18, 61, 62).

It exceeds by 100 per cent or more the total freight revenue of six such roads. The freight revenue per mile of road operated exceeded the corresponding ratio on all but two of the eleven railways (Ex. 36-A, R. 437; Ex. 37-A, R. 439; Ex. 38-A, R. 441).

The increase was not due only to the hauling of coal to a single consignee. It handled various products, depending upon the season and locality (Ex. 44-A, R. 450).

In 1925 the North Shore carried 536,095 tons of freight. In 1937 the North Shore carried 1,790,437 tons (Ex. 40-A, R. 445; Ex. 41-A, R. 446).

It measures up fully to the standard set up in the Texas Electric Railway case, to wit:

> (a) That an electric railway which is engaged in the general transportation of freight whether the revenue therefrom is greater or less than its passenger revenue. The total revenue from transportation of freight, express and mail of the Texas Electric in 1933 was $338,853, while in 1937 the combined freight and express of the North Shore was $856,276 (Ex. 58-A, R. 493);
>
> (b) Which handles the bulk of such freight in standard equipment similarly used by steam railroads;
>
> (c) Which freely interchanges the same with steam railways for transportation to and from points on their lines;
>
> (d) Which has a considerable portion thereof handled in interstate or foreign commerce;
>
> (e) Which participates in standard rates with the steam railroads for interstate transportation.

It handles freight in carload and less-than-carload lots; the bulk is in carload shipments in much the same manner as on the steam railways. It offers all the protective service for shipments of perishable goods available on the steam railroad systems. It performs switching services for industries situated along its tracks. It has reciprocal switching arrangements with steam railways. Its freight is of diverse character. In a single day's business commodities handled in carload lots may vary from cabbage to tractors (Ex. 17-A, R. 414; Exs. 51-A to 58-A, R. 479-493, 703, incl.; Ex. 44-A, R. 450).

In 1937 it earned $811,522, while the Sacramento North-

ern Railway earned but $722,420, and it was held that in revenue it was more extensive than those of true interurbans.

In 1936 its freight revenue exceeded that of the Spokane-International Railway, a Class 1 steam railway of the northwestern region, and in 1936 the density of its freight traffic exceeded that on the lines of four of the twenty-five Class 1 steam railways of the northwestern region (Ex. 36-A, R. 437; Ex. 38-A, R. 441; Ex. 39-A, R. 443).

In 1937 it handled 1,709,914 tons of freight; 93.5 per cent was handled in carload lots in standard equipment. Approximately 50 per cent is ferry truck service, which is carried on standard steam railroad flat cars. Ferry truck service by trucks owned by it was discontinued on April 15, 1937, yet that type of service has been on the increase because it is done on ferry trucks of private contractors (Ex. 17-A, R. 414; Ex. 19-A, R. 417).

It interchanges freight with four railroads at six points and through one of these it has connections with all the steam railroads serving the Chicago area.[1]

Exhibit 23-A (not included in transcript)* shows that a single train revealed equipment belonging to twenty-eight steam railroads and transportation companies.

It exceeded all other eleven electric railways in percent-

1 (a) With the C. M. & St. P. R. R. at three points:
1. Within the corporate limits of the City of Racine, Wisconsin;
2. Within the corporate limits of the City of Chicago, Illinois, at Buena Park;
3. At Rondout, Illinois.

(b) With the C. & N. W. R. R.:
1. At Great Lakes, Illinois;
2. At Oakton street in the City of Niles Center, Illinois.

(c) With the Soo Line:
1. Within the corporate limits of Mundelein, Illinois;
2. Rondout, Illinois, throughout the Belt line, to wit: the Elgin, Joliet and Eastern Railroad with all the railroads operating into the Chicago area.

*Not included in transcript signifies that it is part of the record but, by stipulation (R. 569), not printed.

age of the freight in interstate commerce. Exhibit 21-A (R. 419) shows that in a two weeks period it handled carload shipments originating in twenty-seven states from the Atlantic Coast to the Pacific Coast and from the Gulf Coast to the Canadian border. Some of these shipments terminated in Canada.

As an initial carrier it participated in 365 tariffs, and as delivery and/or intermediate carrier 954 tariffs. It maintains freight solicitors at points as far west as Portland, Oregon, and as far east as Washington, D. C. (Ex. 22-A, R. 421; Ex. 21-A, R. 419; Ex. 24-A, R. 422, also R. 130).

The North Shore has approximately the same amount of way switching tracks in relation to miles of road owned as the Class 1 steam railways of the United States, and is slightly better equipped in this respect than the Class 1 steam railways of the western district (Ex. 13-A, R. 411).

Its freight classification yards at Pettibone, Great Lakes, has a capacity of 202 freight cars. Its right of way north of North Chicago Junction to Milwaukee is 100 feet wide, and south to Howard street, Chicago, is more than fifty feet wide and ample for the location of switching tracks for the use of industries situated along its lines [Ex. 70-A, R. 515; Ex. 45-A, p. 4, Sec. 2 (h), Not in T.].

Its schedule of tariffs enables it to participate in the movement of freight to all parts of the country. Its facilities are so complete that in 1937 it was able to handle 24,416 cars of carload freight in intermediate or bridge service, in direct competition with the steam railroads (Ex. 19-A, R. 417).

It was held that interurbans are built largely upon streets and public highways. The North Shore operates from Howard street, Chicago, to Harrison street, Milwaukee, via the Skokie Valley Line, over its own private right

of way over the entire route [Ex. 45-A, p. 4, Sec. 2 (f), Not in T.].

The Shore Line division is not used for through trains, except for one train daily. It operates in city streets in common with vehicular traffic for only 2.6 miles of route. The right of way on less than 3 per cent of the owned miles of route is not owned by the North Shore. The percentage of miles of route owned is higher than that of nine of the eleven comparable electric railways ruled to be more than interurbans (Ex. 9-A, R. 405).

Its grade crossings are protected by a modern system of devices.[1]

In addition, the majority of the numerous railroad crossings protected by gates are jointly owned and maintained by various railroads with the North Shore but operated by North Shore men (Ex. 25-A, Not in T.).

It maintains interlocking towers on an expense-sharing basis with steam railroads. It repairs the equipment of foreign lines, when necessary; has filed tariffs in which it participates in the movement of freight with the steam railroads of this country, and through its membership in various freight associations it has co-operated with the steam railroads in the development of regulation of the general transportation system (Ex. 24-A, R. 422; R. 157, 164).

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1 Four with Northwestern:
(a) South Milwaukee, Wisconsin;
(b) Kenosha, Wisconsin;
(c) Lake Bluff, Illinois;
(d) Skokie Valley, Illinois.

One with Chicago, Milwaukee & St. Paul:
(a) Racine, Wisconsin.

All of the above jointly owned and maintained, but operated by North Shore men exclusively.

One with Rapid Transit:
(a) At Niles Center, Illinois, owned and operated by North Shore.

The right of way is fenced for almost the entire distance, which permits a speed of fifty-five miles per hour, including stops. Surely that is not interurban (Ex. 14-A, Not in T.). IT IS NOT EXCEEDED BY STEAM LINE PASSENGER TRAINS.

It is said that the passenger operations of an interurban differ from those of a street or suburban railway mainly in extent of its lines, and it has been held in that same case that "if the line extends from city to city it is termed an interurban, although handling the same traffic and being operated in substantially the same manner as a street or suburban line."

The local transportation of passengers was only 4.6 per cent of the total revenue derived from street car service. It operates under conditions which make the average speed of this road fifty-five miles an hour, including stops between Chicago and Milwaukee, possible. Street and suburban railways rarely operate trains in excess of one or two coaches, or at such high speed. The North Shore operates as high as eight. It owns modern terminal facilities similar to that on steam railways (R. 244-247).

It sells through railroad and Pullman tickets to any place in the United States, Canada or Mexico and provides all the service, including baggage, as steam railroads. The North Shore has every feature of a steam railroad and not of street, suburban and interurban railways, including full dining car service. Its trains are operated under standard steam railroad rules (Ex. 28-A, R. 424).

In 1937, 37.5 per cent of the passenger revenue earned was from interstate traffic. The highest interstate passenger revenue reported by any of the eleven comparable electric railways was less than 3 per cent (Ex. 26-A, R. 422; Ex. 27-A, R. 423).

Only three of the eleven railroads earned more revenue from freight operations than does the North Shore[1] (Ex. 36-A, R. 437).

Mere deviations from standard steam railroad operations do not constitute interurban operation.[2]

The ballast on the Skokie Valley Line of respondent was of heavier construction than that of the Chicago & North Western Railway (R. 216, 242, 276).

Texas Railroad, 208 I. C. C. 193, 25 Fed. Supp. 825, standard freight cars could not be set at some of the stations because of insufficient clearance, and the freight trains could not be moved over tracks used by passenger cars through the City of Dallas, and that such trains moving from or through Denison had to be switched over the tracks of steam railroads in Dallas, and the freight trains were operated principally at night because of city franchise restrictions, and yet it was held more than an interurban.

In Utah Railroad, even though the bridges on the carrier's lines were not strong enough for steam locomotives or the heaviest coal cars in use on eastern lines, and the franchise restrictions limited the length of train to three cars in Provo, it was held more than an interurban.

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1 It has been held that freight revenue in excess of 50 per cent of total revenue from transportation is not a necessary condition for exclusion from the exemption proviso. It has been maintained that the freight operations of an electric railway may exceed those of a true interurban, even though the passenger revenues exceed the freight revenue.

Again we call attention to what has been said by the Commission in the Texas Electric Railway case, that an electric railway is not an interurban, "if it is engaged in the general transportation of freight, whether the revenue therefrom is greater or less than its passenger revenue."

2 The Chicago Tunnel Company, 214 I. C. C. 81, operated 80 per cent of its route miles on public streets.

Sacramento Northern Railway, 208 I. C. C. 203, the movement of freight on city streets was restricted to certain hours and the number of cars per train limited by franchise and the curves on some points too sharp for steam locomotives.

The bridges of the North Shore are admitted sufficient to support an average steam railroad train (Ex. 45-A, Not in T.). Its power is sufficient for sixty-five loaded cars.

Its employees who work on the intercity lines are distinct from those operating the local service.

It reported five off-line freight solicitors.

It participated in 1,319 tariffs. (Compare with Oklahoma Railway.)

The steepest grades on the line of the North Shore are less than those on the Pacific Electric, 215 I. C. C. 414, the Oklahoma Railway, 218 I. C. C. 123, and the Waterloo Railway, 208 I. C. C. 211, which reported grades of 8.2 per cent, 8 per cent and 6 per cent, respectively. Four of the eleven comparable electric railways reported curves of fifty feet and less in radius. The weight of rail of the North Shore is 88 pounds per yard, in general heavier than the Oklahoma, supra; Pacific, supra; Texas, supra, and Waterloo, supra, railways, and the Salt Lake & Utah Railroad Company, 214 I. C. C. 717, had rail running as low as 40 pounds.

What deviation there is, if any, between the North Shore and steam railways is of negligible, minor consideration. An unusual operating condition now and then on the lines of the carrier does not prevent it from doing an extensive freight business, and cannot be considered against it. The lines, equipment and operating conditions of the North Shore differ less in general from those of the steam railroads than in the case of the eleven electric railways.

The North Shore is a member of several freight carrier associations; freight revenue is collected according to the rules laid down for the steam railroads; it repairs foreign freight equipment on its own lines, as required, and its

reports are made out in accordance with the regulations prescribed by the American Railroad Association. It makes its payments and collections of per diem charges according to the procedure of the steam railroads. Its freight business is conducted on standard time. Its various passenger and freight services are in the same manner, including help in planning travel tours. Its trains are run under orders similar to those of the steam railroads, and a considerable portion of the road is protected by the most modern block signal system (R. 216, 226, 227, 228, 234, 247, 248, 253).

It is claimed that freight received from the Chicago Rapid Transit Company at Niles Center cannot be handled without the use of gauntlet tracks so that the cars may clear passenger platforms. Gauntlet tracks are common to almost every steam railroad in America. There are only about six spots where gauntlet tracks are used, and that is on a four-mile stretch between Howard street and Niles Center.

The record discloses it does not interfere with the regular passenger tracks. Standard freight equipment of all steam railroads pass over those tracks without restrictions.

About four miles of track between Buena Park and Howard street in Chicago are leased by the North Shore from the Chicago, Milwaukee, St. Paul and Pacific Railroad, and the North Shore sublets that portion to the Chicago Rapid Transit Company, although it is used exclusively by the North Shore.

The reason for the sublet is due to jurisdictional differences between the intervening respondent's labor organization and another local union, 241.

While all freight from the north (Milwaukee) is handled

by the men of the North Shore to Buena Park, all freight from Buena Park north to Howard street only is handled by the employees of the Chicago Rapid Transit Company, and beyond that by the North Shore men.

It was held in Piedmont Northern Railway, 298 U. S. 311, that that railroad, "* * * competes with steam trunk lines in such manner, that in view of the declared policy of the act we cannot hold it an 'interurban' railway within the exemption of the same paragraph."

Applying that principle to the North Shore—it competes with steam trunk lines carrying passengers between Chicago and Milwaukee; handles 60 per cent of its carload freight in bridge service between railways; competes with the steam railroads, and its employees perform substantially the same services as by employees of steam railways.

The North Shore exceeded the trackage of nine of the eleven railways. Its units of equipment were substantially in excess of that of ten of the eleven electric railways (Ex. 31-A, R. 430). If we exclude the Pacific Electric from the average, the North Shore operated two and a half times as many units of equipment as did the remaining ten electric railways (Ex. 31-A, R. 430).

The North Shore was held to be more than an interurban under the Locomotive Inspection Act. That decision was reached on the basis of miles of track operated; amount of freight and passenger equipment; track connections with steam railroads; facilities for interchange of freight with such roads; number of railroads with which it had joint tariffs and through rates; the number of carloads received from the connecting railroads; passenger and freight revenue; per cent of right of way which was privately owned; that this road transported express and baggage, and that it performed switching services along its lines.

Of all the railroads ruled to be more than interurbans only three interchanged more carloads of freight than did the North Shore; only three carried more freight than the North Shore. Twenty-two roads operated a greater percentage of their lines over public streets and highways; only five had more freight cars, and twenty-eight had less units of equipment than the North Shore. Eight of the thirty-four roads ruled to be not exempt reported more locomotives than the North Shore had then, but only four reported more locomotives than the North Shore has now. Since 1935 the North Shore has increased the number of miles of track, added two steam locomotives, and has increased the percentage of right of way which it owned. Between 1925 and 1937 it increased the tons of freight moved by 218.9 per cent, whereas the number of passengers carried has fallen off by 27.1 per cent (Ex. 31-A, R. 430; Ex. 69-A, Not in T.; Ex. 41-A, R. 445).

For direct comparison with the Utah and Texas Railroads held to be more than interurbans, we call attention to charts I and II. (See appendix.) We also call attention to:

COMPARATIVE DEVELOPMENT AND SERVICE.

North Shore—A distributor of merchandise for and to all parts of the United States in large industrial districts and adjacent farming territory.

Utah Railroad—To develop and serve two valleys in Northern Utah and encourage the production of sugar beets; industrial development fostered by collecting raw products from the fields and delivering them to the processing plants located on its line, and delivering to those plants the necessary materials for such processing from outside of the territory served.

Texas Railroad—Originally constructed for passenger and express service only. Incorporated as an interurban in

1916. Freight handled since 1928, due to loss of passenger service. Mostly intrastate commerce. Fifteen industries located adjacent to its tracks. Intrastate shipments average about double interstate shipments. The interline shipments move from or through the country. It is an intermediate carrier of service on through routes, but the traffic moving on these routes has not been large so far.

COMPARATIVE GRADES AND RAILS SUITABLE TO STEAM RAILROAD TRAINS.

North Shore—Suitable.

Utah Railroad—Not suitable.

Texas Railroad—Not suitable in various parts.

COMPARATIVE INTERLINE SERVICE.

North Shore—Complete interline service in all things.

Utah Railroad—Hauls sugar beets to the plants and their output to steam railway lines.

Texas Railroad—The bulk of its freight in interline service.

COMPARATIVE CLASS OF PASSENGER TRAFFIC.

North Shore—Interline passengers through Chicago and Milwaukee.

Utah Railroad—Main passenger traffic transportation of students to and from two high schools.

Texas Railroad—Intrastate, no interline tickets sold to or from points on the steam railroads.

COMPARATIVE ABILITY TO OPERATE AS A STEAM RAILROAD.

North Shore—Can be operated as such.

Utah Railroad—Cannot be operated as such. Reconstruction of its road would prohibit it to continue in existence.

Texas Railroad—(a) Standard freight cars could not be put at some stations for lack of sufficient clearance;

(b) Freight trains could not be moved over tracks used by passenger cars through Dallas;

(c) City franchise restrictions in Dallas prohibited freight trains other than at night.

The Examiner and the Interstate Commerce Commission found the facts in favor of the North Shore. The District Court in its review of the Commission's findings of fact sustained it, and the Circuit Court of Appeals sustained the findings of the District Court.

B.

THE COMMISSION HAD POWER TO REOPEN THE PROCEEDINGS HERETOFORE DECIDED BY IT AND REVERSE ITS EARLIER DECISION.

The Circuit Court of Appeals held:[3]

> "In rendering its decision, the Commission stated, 'Undoubtedly this is a close or border-line case, but considering the view expressed by the Supreme Court in the case hereinbefore cited, together with the absence of any opposition of record to the contention that this carrier is exempt, and the fact that *no carload freight is handled to or from or interchanged at either of the two principal terminals,* which are much the largest cities served, the doubt must be resolved in favor of holding that the carrier falls within

[3] United States v. Chicago, North Shore and M. R. Co., 288 U. S. 1, decided January 9, 1933 (p. 2 opinion, R. 575, following transcript).

the exemption.' (The matter in italics was shown upon the subsequent hearing not to be true.)"

The only issue there was the financial structure of the North Shore. Over sixty million dollars of securities, of which thirty-nine million dollars of face value was outstanding in the hands of the public, issued with the approval of the State Commissions of Illinois and Wisconsin, but without authority of this Commission, on the theory that the carrier was exempt therefrom as an interurban. For ten years the Commission had knowledge thereof, but filed no objection for the reason that if the North Shore were held not exempt all of said securities outstanding in the hands of the public would be void and would bring ruin to innocent investors. Neither the intervening respondent nor any employe of the Receiver in any way participated in that case. Their interest was in nowise affected.

Railway Labor Act Docket No. 7 was instituted at the request of the National Mediation Board and was reopened on the Commission's own order.[1]

The Receiver filed no exception to the order.[2] Oral argument is no substitute for exceptions:[3]

"The Interstate Commerce Commission is an administrative body and is not to be hampered in its proceedings by the hard and fast rule as to pleading and practice which prevail in courts of law."[4]

"The Commission, like a court, may, upon its own motion or upon requests, correct any order still under

1 (R. 273)

2 The Interstate Commerce Commission, Rule XIV (d) 6, provides as follows:

"(Examiner's Statement as Basis for Commission's Report.) In the absence of exceptions that are sustained or of ascertained error, the statement of the issues and of the facts by the examiner will ordinarily be taken by the Commission as the basis of its report."

3 N. 1913, Inters. Com. Acts Ann., p. 1817.

4 Pennsylvania R. Co. v. United States, 288 F. 88-90.

its control without notice to a party who cannot possibly suffer by the modification made."[5]

The order was an exercise of discretion, circumscribed with due care, and no abuse of power is asserted:

> "Wisdom of reposing in Interstate Commerce Commission power to reopen cases without regard to when final order in cases was entered was matter for Congress, and not Courts, to determine."[6]

> "After a decision, order, or requirement has been made by the commission **in any proceeding** any party thereto **may** at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear." (Emphasis ours.)[7]

The status is a continuous one. That is a distinction between administrative and judicial law. An administrative body has continuous supervision over those who are before it, while courts, except courts of equity in certain cases, seek to make final adjudication. It would appear that an order, which, upon rehearing, presents a situation quite different from that which formerly appeared, should be deemed, like a rate order, not res judicata. That the Commission at one time decided one way is no legal bar to a different decision by it at another time.[8]

At the hearing of Railway Labor Act Docket No. 7 no evidence was introduced on behalf of intervener-respondent or any employee. Those participating were abetting the Receiver, without opposition or exceptions. It was virtually a friendly case by default. The record in the instant case presents an entirely different situation. In the de-

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5 Louisville & Nashville Railroad Company v. Sloss-Sheffield Steel & Iron Company, 269 U. S. 217.

6 Froeber-Norfleet, Inc., v. Southern Ry. Co., 9 F. Supp. 409.

7 Title 49, U. S. C. A. §16a; Baldwin v. Scott County Milling Co., 307 U. S. 478, 83 L. ed. 1409.

8 Tagg Bros. & Moorhead v. United States, 280 U. S. 443, 74 L. ed. 524-537.

fault hearing the Skokie Line was completely subordinated, while in the present contested hearing it was proven conclusively that the Skokie Valley Line, with the rest of its system, gave the North Shore all the characteristics of a railroad. The contest by Division 900, etc., now an intervener-respondent, and other labor organizations brought out affirmative, substantial and sustaining proof that the North Shore was out of the proviso. The first decision was by a division of the Commission, while the case under consideration was decided by the entire Commission. Four separate tribunals (the Examiner, the Interstate Commerce Commission, the District Court and the Circuit Court of Appeals) each found that the evidence sustains that the North Shore does not fall within the exemption proviso.

CONCLUSION.

We have presented this brief much in the form of a summary supplement to that of the Government's. The findings of fact are easily sustained. There are no questions of law involved which this Court has not heretofore disposed adversely to the petitioner, no conflict of decisions, and no issue of general public importance. We believe, therefore, the petition for certiorari should be denied.

Respectfully submitted,

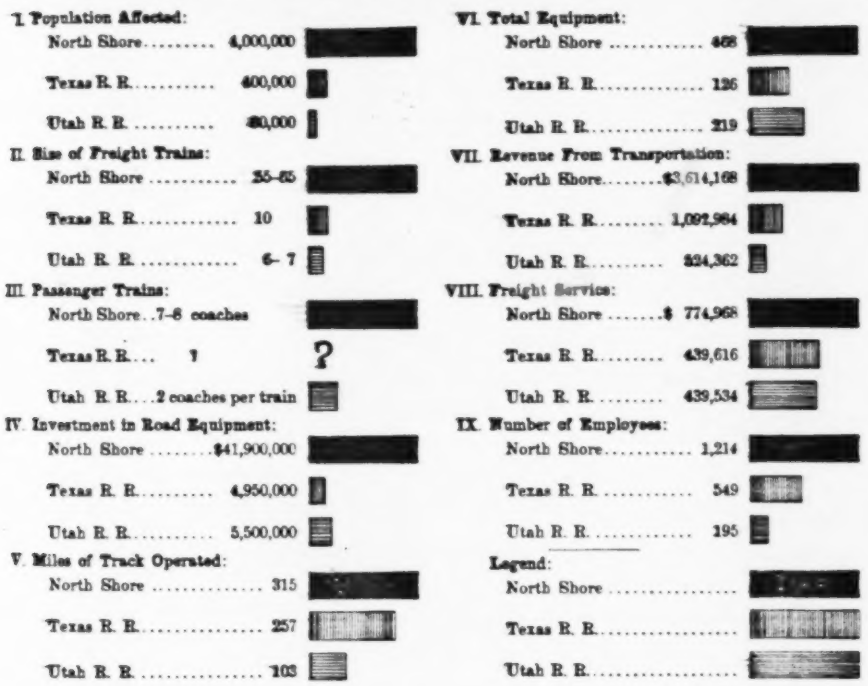
WM. B. RUBIN,
Attorney for Intervener-Respondent
Division 900 of the Amalgamated
Association of Street Electric Railway and Motor Coach Employees
of America.

September 26, 1941.

Address of Attorney:
606 W. Wisconsin Ave.,
Milwaukee, Wis.

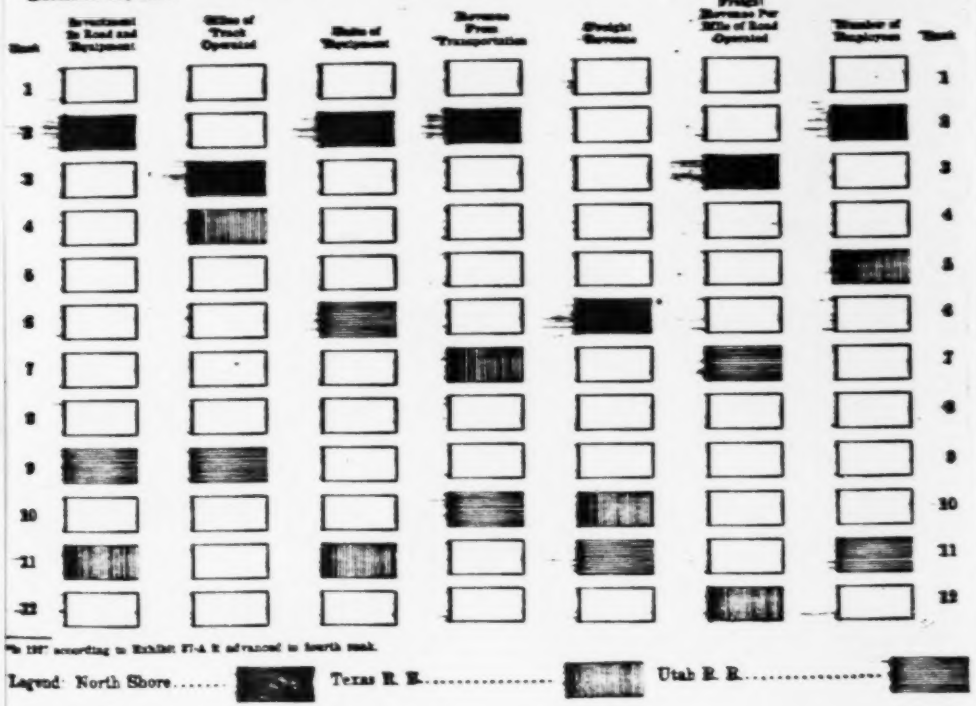
APPENDIX (CHART I).

Chicago North Shore and Milwaukee Railroad Company Compared With Texas Railroad and Utah Railroad Ruled Not to Be Within the Exemption Proviso of the First Paragraph of Section One of the Railway Labor Act as of the Year Ended December 31, 1936.



APPENDIX (CHART II).

The Chicago North Shore and Milwaukee Railroad Company Compared With Eleven Electric Railways Ruled to Be Not Within the Exemption Proviso of the First Paragraph of Section One of the Railway Labor Act as of or for Year Ended December 31, 1936.



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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 592

A. A. SPRAGUE, AS RECEIVER FOR THE CHICAGO, NORTH SHORE AND MILWAUKEE RAILROAD COMPANY, PETITIONER

v.

J. ALBERT WOLL, UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the district court (R. 544–548) and the opinion of the circuit court of appeals (R. 574–579) have not yet been reported. The reports of the Interstate Commerce Commission (R. 167–174, 523–536) are reported in 219 I. C. C. 135, and 234 I. C. C. 13.

JURISDICTION

The decree of the circuit court of appeals was entered on July 22, 1941 (R. 580). The petition for writ of certiorari was filed on September 8, 1941.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the determination of the Interstate Commerce Commission that the North Shore is not an interurban electric railway within the meaning of the exemption proviso in Section 1, First, of the Railway Labor Act is arbitrary, capricious, unsupported by substantial evidence, or otherwise contrary to law.

2. Whether the determination of the Interstate Commerce Commission that the North Shore is "a part of the general steam-railroad system of transportation" and for that reason also not covered by the aforesaid exemption proviso is arbitrary, capricious, unsupported by substantial evidence, or otherwise contrary to law.

3. Whether in the circumstances of this case, after it had once determined that the North Shore was an interurban railway exempt from the Act, the Interstate Commerce Commission had power on its own motion to reopen the proceeding for further hearing and then to hold that the North Shore was not an interurban railway.

THE STATUTE INVOLVED

The section of the Railway Labor Act (44 Stat. 577, as amended, 48 Stat. 1185, 45 U. S. C., Secs. 151–163) primarily involved is the proviso in Sec-

tion 1, First, exempting certain interurban electric railways from the definition of "carrier." This proviso reads as follows:

> * * * *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

STATEMENT

Upon request of the National Mediation Board, the Interstate Commerce Commission instituted a proceeding to determine whether the Chicago, North Shore & Milwaukee Railroad (hereinafter called the North Shore) came within the proviso exempting certain electric railways from the Railway Labor Act. After the hearing, at which the carrier's contention that it was an interurban electric railway within the proviso was unopposed, Division 3 of the Commission on November 7, 1936, issued its report finding the North Shore to be exempt (R. 167–174). On August 29, 1937, Division 900 of the Amalgamated Asso-

ciation of Street, Electric Railway, and Motor Coach Employees of America, and on February 9, 1938, the Commissioner of Internal Revenue, requested the Interstate Commerce Commission to determine the status of the carrier under the identical exemption provisos in the Railroad Retirement Act of 1937 and the Carriers' Taxing Act of 1937, respectively. The complaint filed by the Amalgamated contained allegations (subsequently found to be true) inconsistent with some of the principal facts upon which the Commission's report in the Railway Labor Act proceeding had relied (R. 178). The carrier moved to discontinue the proceeding on the ground that the matter had been settled in the Railway Labor Act case (R. 181–190). The Commission denied the motion, and at the same time, on its own motion, reopened the Railway Labor Act proceeding for further hearing and consolidated it with the hearing under the Railroad Retirement Act and Carriers' Taxing Act in order that the status of the carrier under all three statutes might be considered and determined on the same record and in the same proceeding (R. 195–196). A more comprehensive record was compiled at the second hearing, which was adversary in nature (R. 202–518), and the full Commission held on July 11, 1939, that the carrier was not an interurban railway and also that it was a part of the general

steam-railroad system of transportation (R. 522–536).

Thereupon, petitioner brought this action to enjoin the United States Attorney from enforcing the Railway Labor Act against it on the grounds that the determination of the Interstate Commerce Commission that the North Shore was not exempt from the Railway Labor Act was unsupported by substantial evidence, arbitrary and capricious (R. 16), and that the Commission had no power to reopen the case after its original ruling that the carrier was exempt (R. 13–14). The Interstate Commerce Commission and Division 900 of the Amalgamated intervened as parties defendant (R. 46–50, 57, 71). After trial, at which the only evidence consisted of the record before the Commission, the district court held that the Commission's decision was supported by substantial evidence and that the Commission had power to reopen the proceeding after its original determination (R. 544–550). The circuit court of appeals affirmed (R. 574–579).

The facts in the record which support the Commission's decision may be summarized as follows:

The North Shore operates an electric railway between Chicago and Milwaukee; between the outskirts of Chicago and Waukegan (about half of the distance from Chicago to Milwaukee (R. 407)) the carrier operates two lines, one known as the Shore Line and the other as the Skokie Valley

Line (R. 241). Most through and freight traffic is carried on the Skokie Valley route, generally referred to as the "main line" (R. 227, 247, 257, 104, 358, 395). The roadbed and trackage from Chicago to Milwaukee through the Skokie Valley is comparable with that of the steam railroads (R. 242, 275–277, 214). Carload freight in standard steam equipment can be carried over the entire line except for 22 miles between Evanston and Highland Park on the Shore Line route and between freight terminals at Buena Park, Chicago, and Harrison Street, Milwaukee, and the downtown sections of those cities (R. 527, 211, 228, 239, 425).

The North Shore carries suburban passenger traffic, but in addition is engaged in operating a through passenger service between Chicago and Milwaukee which in speed, number of trains, and kinds of service is comparable to that of the steam roads (R. 245, 324, 424, 529), one of which, the Chicago & North Western, runs parallel to the North Shore (R. 358, 365).[1]

In 1937 the North Shore carried over 36,000 cars or 1,599,403 tons of carload freight, 99 per-

[1] The average speed of the North Shore trains between the cities of Chicago and Milwaukee is about 55 miles an hour, which compares favorably with that of the trains of the Chicago & North Western Railroad (R. 245). Indeed, the North Shore acquired "top honors" for fast trains in a rating comparing all of the railroads in the country (R. 324). Some of the trains contain dining and parlor cars (R. 218–19, 245, 252, 363).

cent of which was interchanged with steam lines and thus was obviously of the same character as that carried by the steam roads, and 110,000 tons of less than carload freight, only a small proportion of which was interline (Exhibits 17 A, 60A, R. 414-415, 501). Altogether, over 93 percent of the freight carried was interchanged (*ibid.*). With respect to two-thirds of the carload freight, the North Shore acted as connecting carrier between one steam line and another (Exhibit 19A, R, 417). It carried the freight in trains frequently as long as 20 cars, and sometimes, with engines coupled, as long as 65 (R. 215, 219, 376, 449). Approximately 23 percent of its transportation revenues was derived from freight traffic (Exhibits 57A, 58A, R. 339, 491–493). The density of this traffic, as shown by freight revenue per mile, is greater than was the case on the Texas Electric, the Utah Idaho Central and most of the other electric railways which have been held not to be interurban within the meaning of the Railway Labor Act (Ex. 34A–38A, R. 319–320, 435–441), and also greater than that of several steam roads of the northwestern region (Ex. 39A, R. 443–444, 321). The North Shore's carload freight operations have been steadily growing in importance; freight operations were conceded by petitioner's main witness to be "the most profitable part of our business" (R. 387).

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ARGUMENT

I

On the merits, the decision below is shown to be correct by the decision of this Court in *Texas Electric Railway Co.* v. *Eastus*, 308 U. S. 512, affirming *per curiam*, 25 F. Supp. 825, which upheld a determination of the Interstate Commerce Commission that the Texas Electric Railway was not an interurban exempt from the Railway Labor Act.

The North Shore and the Texas Electric clearly fall within the same class. Indeed, in many respects, the North Shore more closely resembles a standard steam railroad than did the Texas Electric. This is true as to its physical characteristics and as to the manner in which both its passenger and freight operations are conducted. Whereas the Texas Electric was lighter in construction, the Skokie Valley route of the North Shore compares favorably in construction with the steam roads (cf. 208 I. C. C., at 195, with R. 249, 255, 273–274, 330, 357). Although the passenger service of the Texas Electric was concededly interurban in character (appellee's brief, p. 15), the North Shore operates a passenger service between Chicago and Milwaukee which is comparable in speed and accommodations to that performed by the steam lines (R. 218–219, 245, 252, 324, 363, 424).

The North Shore runs much longer freight and passenger trains than the Texas Electric (cf. 208 I. C. C., at 197, with R. 215, 219, 376, 449, 245). Both its gross freight revenues and the density of its freight traffic, as demonstrated by freight revenues per mile, are from 3 to 4 times as great as in the *Texas Electric* case [2] (Ex. 36A, R. 437). The North Shore interchanges a fraction more than 93 percent of the freight carried, which was the percentage reported for the Texas Electric (R. 416).

The North Shore derives about 23 percent of its revenues from the transportation of freight (R. 491, 493). In the *Texas Electric* case, the Government contended that the percentage of the carrier's freight revenues was 37 (appellee's brief, p. 19), while the carrier claimed that the percentage was 20 (appellant's brief, pp. 18, 61, 62).[3] The affirm-

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[2] In 1933, the last year for which data was before the Commission, the freight revenues of the Texas Electric were $215,000 (R. 437, 208 I. C. C., at 196); those of the North Shore in 1937 were $811,000 (R. 437, 493). Freight (including mail and express) revenues per mile for the Texas Electric in 1933 were $1,436; for the North Shore (excluding mail and express) in 1937, $5,881 (R. 437). For the year 1936, Texas Electric freight revenues were $439,616, still much less than those of the North Shore, and freight revenues per mile $1,971, to $5,616 for the North Shore (R. 435–436).

[3] The difference between the two figures is explained by the fact that the Government's computation dealt only with the last year in the record rather than the preceding five-year period, and excluded from "passenger revenues" the substantial revenues of a city street car line operated by the carrier.

ance by this Court *per curiam* would appear to indicate that the difference was of slight consequence. In any event, any difference in the proportion of freight revenues must be balanced against the other characteristics of the two roads. Clearly, in view of all of the above facts the Commission did not act arbitrarily or without substantial evidence in putting the two carriers within the same general category.

In *Hudson & M. R. Co.* v. *Hardy,* 103 F. (2d) 327 (C. C. A. 2), certiorari denied 307 U. S. 640, where the electric railway carried only passenger traffic, but derived 22.97 percent of its revenues from the operation of a joint service with the Pennsylvania railroad, it was held that the relationship between the two carriers was sufficient to justify a finding by the Commission that the road was a part of the Pennsylvania system and hence was within the clause in the exemption proviso excluding from the exemption electric railways operated as "a part of a general steam-railroad system of transportation." The percentage of non-local passenger traffic in that case, it will be noted, is almost identical with the percentage of the petitioner's freight revenues here.[4] This

[4] The fact that the *Hudson & Manhattan* case was decided on the basis of another clause in the exemption proviso does not weaken it as authority for the proposition that evidence applicable only to 23 percent of a carrier's operations may be sufficient to support a Commission determination that the carrier is not exempt from the Act.

Court's denial of certiorari, when similar contentions as to the importance of ratios and percentages were raised, clearly suggests that questions of the type presented here are not of sufficient general importance to warrant the granting of the writ.

II

The decision below does not conflict with *United States* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1.[5] That case arose under Section 20a of the Interstate Commerce Act (41 Stat. 494, 49 U. S. C. § 20a), which contained a somewhat similar statutory exemption for interurban electric railways, but did not authorize the Interstate Commerce Commission to determine which lines came within the exemption. Suit was brought by the United States in the district court, which, after trial, found the facts and determined that the North Shore was an interurban railway. This Court affirmed, its opinion twice pointing out that the question was "not free from difficulty" (288 U. S. 1, 10–11, 13).

1. In the earlier *North Shore* case the courts were called upon to determine the carrier's status

[5] Petitioner also asserts that the decision below is in conflict with *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299; *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, and the *Hudson & Manhattan* case, *supra*. Each of those cases held the carriers involved subject to the Railway Labor Act; they obviously do not conflict with the case at bar.

as an original proposition. Here the Court's task is to determine whether an administrative decision is arbitrary or unsupported by substantial evidence. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 185. If we assume that the facts in the instant case are identical with those previously before the Court, it still cannot be said that the Commission acted arbitrarily, particularly since the Court recognized the issue to be a close one.* The Court has frequently stated that in reviewing administrative decisions, "Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment." *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304. Cf. *Virginian Ry.* v. *United States*, 272 U. S. 658, 665–666; *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775; *Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 226.

2. The first *North Shore* case is also distinguishable because of the absence here of the equitable considerations which were deemed of "great significance" in the former decision (288 U. S. 1,

* In this connection the three-judge district court in the *Texas Electric* case (25 F. Supp. 825, affd. 308 U. S. 512), declared with respect to the *North Shore* case (25 F. Supp., at 833): "One cannot very well say that the Supreme Court, in the latter case, would have overturned a finding by the Commission that the road was not entitled to the proviso, had the Commission acted under the congressional authority given it in 1934."

12–14). A decision holding the North Shore a "carrier" under Section 20a might have invalidated millions of dollars of securities previously issued without objection by, although with the knowledge of, the Interstate Commerce Commission.[7]

3. Differences in the records before the Court then and now also serve to distinguish the Section 20a case from the case at bar. This Court's opinion in the first case (288 U. S., at 9) indicated that carload freight could not be handled in Chicago and Milwaukee and that such freight could not be interchanged in Chicago; the present record shows the contrary (R. 211, 217, 228, 258, 260–262, 304, 376–379, 407, 409). The findings (R. 145, 146) and opinion in the first case (288 U. S., at 9) imply that the grades, curves, and other restrictions which would limit the use of steam railroad freight cars are found generally along appellant's lines;

[7] Although the Commission had informally treated the North Shore as exempt from Section 20a, it had formally held the carrier to be subject to the Locomotive Inspection Act which contained a similar exemption proviso. *In the Matter of Rules and Instructions for Inspection and Testing of Locomotives Propelled by Power other than Steam Power*, 122 I. C. C. 414, 428, 439 (1927). Thus, whatever the practice under section 20a itself, there had been no uniform administrative construction holding the North Shore covered by all of the exemptions for interurban lines in the various provisions of the Interstate Commerce Act and related statutes. See *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 312.

the present record shows that such conditions are not applicable to the main through route through the Skokie Valley (R. 211, 249–252, 255, 273). Moreover, between 1930 and 1937 the proportion of freight revenues from freight interchanged with other lines rose from 42 percent to 71.75 percent and the proportion of freight tonnage so interchanged from 78 percent to over 93 percent (cf. 288 U. S., at 9, with R. 415).

These distinctions might not be regarded as of great consequence if the Court had not given weight to the facts mentioned in deciding what it indicated to be a close case. They might under the circumstances have caused the Court to reach a different conclusion, and certainly are sufficient to show that the determination of the Interstate Commerce Commission on the present record is not an arbitrary one in conflict with this Court's decision.

III

Petitioner contends that the Commission had no power to reopen the proceeding under the Railway Labor Act after having held the North Shore to come within the exemption proviso.

1. Neither the Railway Labor Act nor the Interstate Commerce Commission Act expressly authorizes the Commission to reopen cases on its own motion, although Section 16a (now Section 17 (6), 54 Stat. 915) of the latter Act authorizes the Com-

mission to grant rehearings on application of a party, Section 13 (2) empowers it to "institute" inquiries on its own motion, and Section 16 (6) permits it to "modify its orders." Nevertheless, it has long been the accepted construction of the latter statute and the common practice of the Commission under it to reopen proceedings and to modify orders upon its own motion. In a number of cases the Commission has expressly held that it has such power.[8] In Sharfman, *The Interstate Commerce Commission*, Vol. IV, p. 240 (1937), it is stated:

> * * * Most cases that are reopened for further proceedings before the Commission are supplemented, reheard, reargued, or reconsidered in response to petitions of the parties; *but frequently, also, and with undoubted authority, the Commission reopens proceedings on its own motion.* * * * [Italics supplied.]

This power has never been doubted by any court; on the contrary, the Commission's power to modify its orders upon its own motion has been upheld. *Louisville & Nashville R. R.* v. *Sloss-Sheffield Co.*,

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[8] E. g., *American Cyanamid Co.* v. *Ann Arbor R. Co.*, 196 I. C. C. 641; *Tompkins-Kiel Marble Co.* v. *Lehigh Valley R. Co.*, 191 I. C. C. 355, 357; *Creomulsion Co.* v. *Southern Ry. Co.*, 185 I. C. C. 724, 727; *Lignite Coal from North Dakota, etc.*, 126 I. C. C. 243, 245; *Douglas & Co.* v. *Chicago, R. I. & P. R. Co.*, 21 I. C. C. 541, 544; *Wilbur Lumber Co.* v. *Director General*, 151 I. C. C. 759, 760.

269 U. S. 217, 225; *Froeber-Norfleet, Inc.* v. *Southern Ry. Co.*, 9 F. Supp. 409, 411 (N. D. Ga.).[9] In *Fly* v. *Heitmeyer*, 309 U. S. 146, 148, where the Federal Communications Commission reopened a proceeding upon its own motion, this Court approved its action, though the Communications Act grants the Commission no express authority to reopen.

There is no reason to believe that Congress intended the Interstate Commerce Commission to have less authority "to fashion [its] own rules of procedure" (*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143) in proceedings under Section 1 of the Railway Labor Act than in proceedings under other statutes subject to its jurisdiction. Indeed, Section 16a of the Commerce Act, which permits the Commission to hold rehearings on application of parties and thereby establishes the Commission's continuing jurisdiction over its proceedings (*Baldwin, Trustees* v. *Scott County Milling Co.*, 307 U. S. 478), refers to "any proceeding" before the Commission and thus would seem to apply to those under the Railway Labor Act.

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[9] Cf. *Baldwin, Trustees* v. *Scott County Milling Company*, 307 U. S. 478, 484; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 382 (concurring opinion); *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 445; *In re National Labor Relations Board*, 304 U. S. 486.

In any event, the power of administrative agencies on their own motion to reopen cases in order to correct errors, take additional testimony when there is ground to believe the original record inadequate, or bring about a reasonable uniformity in decision would appear to be inherent, in the sense that Congress would always intend it to exist even in the absence of an express statutory declaration. Cf. *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 375, and cases cited *supra*. Statutes seldom regulate the minutiae of administrative procedure; such matters are generally left subject to administrative control, either through a general power to make rules or by necessary implication.

2. Whether or not the Commission may, under all circumstances, reopen its prior determinations, there can be no question that it acted reasonably and not in abuse of discretion in doing so in this case. It was desirable that the Commission reach a uniform decision as to the North Shore's status under the identical language of three statutes. And apart from this, the complaint filed in the Railroad Retirement Act case and the record subsequently made in the reopened proceeding negatived the existence of some of the facts upon which the Commission had relied most heavily in its original report.[10] The first record, for

[10] The Circuit Court of Appeals stated that "The evidence upon which the original report was based was very incom-

example, indicated that carload freight could not be handled or interchanged within the city limits of Chicago and Milwaukee (R. 117–118, 120–122), and that physical and franchise restrictions rendered the carrier generally unable to handle such freight in the same manner as the steam roads (R. 103–105, 119–120). The second record proved that the company had carload freight terminals in both cities (R. 211, 217, 228, 250, 262, 304, 407, 409) and an interchange connection in Chicago (R. 260–262, 228, 376–379), and that the restrictions in question did not apply to the through route along the Skokie Valley but only to portions of the road in downtown Chicago and Milwaukee and a section of the Shore Line (R. 211, 227, 249–252, 255, 273, 385). In general, it may be said that, perhaps as a result of its non-adversary character, inaccuracies and omissions in the first record left quite a misleading impression of the carriers' operations.

CONCLUSION

There is no conflict between the decision below and that of any other circuit court of appeals or of this Court. The case has been correctly decided by the court below, the decision directly following that of this Court in the *Texas Electric* case. Ac-

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plete and inadequate" (R. 577), and that at the second hearing "additional facts were in evidence which had not been disclosed at the earlier, nonadversary hearing" (R. 576).

cordingly, the petition for certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
ROBERT L. STERN,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel,
NELSON THOMAS,
Attorney,
Interstate Commerce Commission.

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